



THE
ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1909. *1062*

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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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On the 21st October, 1909, THE HONOURABLE ROBERT FRANKLIN SUTHERLAND, one of His Majesty's Counsel, was appointed one of the Justices of the High Court of Justice, Exchequer Division, in the room of THE HONOURABLE FRANCIS ALEXANDER ANGLIN, transferred to the Supreme Court of Canada.

During Michaelmas Term, 1909, the following gentlemen were called to the Bar:—

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JAMES McEWEN (with honours).

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ERRATA.

- Page 31, 2nd line from bottom: for "*Chailfoux*" read "*Chalifoux*."
" 107, 5th line of head-note: for "person" read "persons."
" 112, 22nd line from top: for "*Lang*" read "*Long*."
" 114, 5th line from bottom: for "*Lague*" read "*League*."
" 184, 14th line from bottom: for "*Cox*" read "*Coe*."
" 401, 10th line from top: for "invalidating" read "validating."
" 612, 8th line from bottom: for "*Denve*" read "*Denne*."

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[MULOCK, C.J. Ex.D.]

JEWELL v. BROAD.

1909

June 21.

*Infant—Contract—Fraudulent Representation as to Age—Benefit Obtained
dehors the Contract—Equitable Relief—Estoppel.*

Unless for necessities, the contract of an infant is not binding on him, nor is he liable for a fraudulent representation that he is of full age whereby the plaintiff is induced to contract with him; and he is entitled to plead infancy in order to escape from a contract procured by his fraud when an infant.

The defendant, being the father of an illegitimate child, entered into a contract with the child's mother, the plaintiff, to pay for its maintenance. The plaintiff's solicitor, before the defendant executed the agreement, inquired of the defendant whether he was of full age, informing him that if he was not, an affidavit of affiliation, already sworn to by the plaintiff, would be filed in order to preserve her rights under the statute. The defendant falsely assured the solicitor that he was of full age, and executed the agreement; and, in consequence of the representation, the solicitor did not file the affidavit; and, the time for filing it having expired, the plaintiff sued upon the contract:—

Held, that the defendant obtained nothing under the contract; the benefit accruing to him from the non-filing of the affidavit was not obtained as a term of the contract; but because of his fraudulent conduct *dehors* the contract; and the plaintiff was not, therefore, entitled to equitable relief; nor was the defendant estopped by his fraud from pleading infancy.

THIS action was brought by the mother of an illegitimate child against the father, to recover moneys which the defendant, by an agreement in writing, covenanted to pay to the plaintiff for the child's maintenance.

The action was tried before MULOCK, C.J.Ex.D., without a jury, at Chatham, on the 15th June, 1909.

A. Clarke, for the plaintiff.

O. L. Lewis, K.C., for the defendant.

June 21. MULOCK, C.J.:—At the time of executing the agreement in question the defendant was an infant. It was proved

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at the trial that the mother had sworn to her affidavit of affiliation, and had left it with her solicitor to be filed with the clerk of the peace, but, at this stage, negotiations were entered into, resulting in the parties reaching an understanding that the defendant would agree to pay to the mother a certain weekly sum for the child's maintenance. Thereupon the solicitor prepared the agreement in question, but, before its execution, inquired of the defendant if he was of full age, informing him that if he was not, the affidavit would be filed in order to preserve the mother's rights under the statute, but that, if the defendant were of full age, the solicitor would accept the agreement on the mother's behalf, instead of filing the affidavit. Thereupon the defendant assured the solicitor that he was of full age, and executed the agreement. In consequence of such representation, the solicitor omitted to file the affidavit, and it is now too late to do so.

The action is on the contract, and the defendant pleads infancy, and the plaintiff asks that on equitable grounds the defendant be not permitted to set up such defence. The question is, whether the plaintiff can recover.

In support of the contention of the plaintiff, Mr. Clarke cited numerous authorities, all of which I have examined, but none of them assists him in this action; they merely illustrate the principle that where an infant induces another, by falsely representing that he is of full age, to enter into an agreement under the terms of which the infant obtains some benefits, the latter, on reaching full age, if he elects against the agreement, must elect against the whole agreement. He cannot at the same time approbate and reprobate; but, rejecting its advantages, must surrender its benefit: that is, the agreement must either stand in its entirety or fall in its entirety. It is in this sense that the authorities speak of the obligation in equity which an infant incurs by inducing a person, by means of false representations, to enter into a contract, as distinguished from the obligation to perform the contract itself: Pollock on Contracts, 5th ed., p. 74. For example, in *Clarke v. Cobley* (1789), 2 Cox Eq. 173, the defendant, an infant, had given to the plaintiff his bond for two promissory notes which had been made by his wife to the plaintiff before marriage. On a suit on the bond he pleaded infancy, and it was decreed that he must surrender the notes, on the

principle that he could not be permitted to take advantage of his own fraud by retaining the notes, and at the same time escape his obligation under the bond. The obligation, however, which thus attached to him is not a contractual one, but merely the consequence of the application of the equitable doctrine referred to.

This action rests entirely upon contract, and the general rule is that, unless for necessities, the contract of an infant is not binding upon him, nor is he liable for a fraudulent representation that he was of full age whereby the plaintiff was induced to contract with him: *Manby v. Scott* (1675), 1 Sid. 109; *Johnson v. Pie* (1677), 1 Keb. 913; *Bartlett v. Wells* (1862), 31 L.J.Q.B. 57.

In the case of *Bartlett v. Wells*, *supra*, to the declaration for goods sold and delivered, the defendant pleaded infancy, to which the plaintiff replied, on equitable grounds, that, at the time of contracting the debt, the defendant, knowing his true age, falsely and fraudulently represented that he was of full age, whereby the plaintiff (having no knowledge or means of knowledge as to the defendant's age) was induced to enter into the contract sued on and to supply the goods in question. It was held that infancy was a bar to the plaintiff's action on the contract, and that the infant is bound no more in equity than in law by a contract procured by its fraud, though a court of equity, treating the whole contract as at an end, might hold him liable as a trustee for the other party in respect of the benefits still in his control, and which came to him by virtue of the agreement, the rescission of which takes from the defendant any title to retain the benefits derived under it. Thus this species of relief is granted, not in recognition of the continuance of the contractual relations between the parties, but because it has ceased to exist.

As stated by Lush, L.J., in *Ex p. Jones* (1881), 18 Ch. D 109, 125, which was a case of infancy: "Now the claim of the respondent against the appellant is clearly not a debt at law; no action could have been maintained for it. The appellant could have pleaded infancy, which would have been a good defence to the action. If the claim could have been maintained in equity on the ground that the infant had made an express fraudulent representation to the respondent that he was of full age, still that would only have been a liability in equity."

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If, in the present case, the defendant, while still an infant, had obtained some property or other valuable thing by virtue of the contract, and still possessed the same upon attaining majority, the plaintiff might have been entitled to equitable relief to the extent of obtaining restitution. But here the defendant obtained nothing at all under the contract. The non-filing of the affidavit was the benefit which the defendant obtained by reason of his false representation; but he did not obtain it as a term of the contract, but because of his fraudulent conduct, which is a matter entirely *dehors* the contract; and the complete rescission of the contract leaves to the defendant no benefit derived by him under any term of the contract. Thus the circumstances afford no opportunity of granting equitable relief to the plaintiff. Moreover, even if the non-filing of the affidavit had been a term of the agreement, I fail to see how the defendant could now enable the plaintiff to comply with the requirements of the statute.

The plaintiff's counsel further urged that, because of his fraud, the defendant should be estopped from pleading infancy. To deny him this right would deprive him of the benefit of the law which renders a person of non-age not liable on his contract except for necessities. Were it otherwise, the position of infants would be perilous. For, in all probability, attempts to prove fraud on their part would be features in most actions against them on their contracts. Notwithstanding fraud upon the part of an infant, it has not been the policy of the law to remove the safeguards which an infant enjoys in the right to plead incapacity to contract in bar to an action on the contract, and he is entitled to plead infancy in order to escape from a contract procured by his fraud when an infant: *Wright v. Leonard* (1861), 11 C.B.N.S. 258; *Liverpool Adelphi Loan Association v. Fairhurst* (1854), 9 Ex. 422. Thus the defendant is not estopped in doing so in the present instance, and this action fails, and must be dismissed, but, in the circumstances, without costs.

E. B. B.

[DIVISIONAL COURT.]

IN RE DENISON AND WRIGHT.

D. C.

1909

April 27.

Municipal Corporations—Incorporation of Village—Continuance in Force of Existing By-laws—Consolidated Municipal Act, 1903, sec. 55—"In Force"—Prohibition of Local Option By-law not Operative.

Section 55 of the Consolidated Municipal Act, 1903, provides that "in case a village is incorporated . . . the by-laws in force therein . . . shall continue in force until repealed or altered by the council of the new corporation:"—

Held, that the words "in force" in this section mean "having the force of law," or, "being in existence;" and that, therefore, a by-law prohibiting the sale of intoxicating liquor, passed by a township council before a village in the township was incorporated, continued in force, within the meaning of the above section, after the incorporation, although it provided that it was not to "come into operation and be in full force and effect" until a date subsequent thereto.

THIS was an appeal by Mrs. Denison from an order of Mulock, C.J. Ex. D., of March 19th, 1909, dismissing her application for a mandamus to the Board of License Commissioners for the license district of East Simcoe, requiring them to consider her application for a license, in the circumstances mentioned in the judgment.

The appeal was argued on April 14th, 1909, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ.

J. Haverson, K.C., for the appellant, referred to the sections mentioned in the judgment of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), especially to sec. 55, and contended that, apart from that section, the by-law in question would not have been in force, and that a license could have been issued at any time before May 1st.

J. R. Cartwright, K.C., for the respondents, contended that the by-law necessarily came into force when the time arrived, and that not even a proclamation was necessary.

April 27. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the applicant from an order of the Chief Justice of the Exchequer Division, dated March 19th, 1909, dismissing her application for a mandamus to the respondents, who constitute the Board of License Commissioners for the license district of East Simcoe, requiring them to consider her application for a license to sell liquor on her premises

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in the village of Coldwater, without reference to a by-law passed by the municipal council of the corporation of the township of Medonte on January 25th, 1908, prohibiting the sale of liquor in that township.

Coldwater was erected as a village by by-law of the county council of the county of Simcoe passed on January 29th, 1908, and was formed out of part of the township of Medonte.

The by-law of the township council to which reference has been made was provisionally adopted on November 11th, 1907, voted on by the electors on January 6th, 1908, and finally passed on January 25th, 1908.

The fifth section of the by-law is as follows:—

“5. This by-law shall come into operation and be of full force and effect on and after the first day of May next after the passing thereof.”

Section 55 of the Consolidated Municipal Act, 1903, provides as follows:—

“55. In case a village is incorporated or a village or town (with or without additional area) is erected into a town or city or a township or county becomes separated, the by-laws in force therein respectively shall continue in force until repealed or altered by the council of the new corporation; but no such by-law shall be repealed or altered unless it could have been legally repealed or altered by the council which passed the same.”

The authority under which the by-law in question was passed is sub-sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, which enables the council of every township, city, town and incorporated village, with the assent of the electors of the municipality, to pass by-laws for “prohibiting the sale by retail of spirituous, fermented or other manufactured liquors in any tavern, inn or other house or place of public entertainment, and for prohibiting the sale thereof except by wholesale in shops and places other than houses of public entertainment.”

By sub-sec. 2 of the same section it is provided that no by-law so passed shall be repealed by the council passing the same until after the expiration of three years from the day of its coming into force, nor until a by-law for that purpose has been submitted to the electors and approved by them in the same manner as the original by-law.

Section 143 provides that "no tavern or shop license shall be issued or take effect within any municipality in which there is in force any by-law passed in pursuance of sec. 141. . . ."

The short question is whether the by-law of Medonte was in force in that township when that part of it which now constitutes the village of Coldwater was erected as a village, within the meaning of sec. 55 of the Consolidated Municipal Act, 1903.

The learned Chief Justice of the Exchequer Division was of opinion that it was, and I am of the same opinion.

The words "in force" are used in various parts of the statute law of this Province, and not always, as I think, in the same sense, and the meaning to be attached to them must be gathered in each case by a consideration of the subject matter to which they relate.

In sub-sec. 2 of sec. 143, which I have quoted in part, they are used, I think, as meaning, when the prohibition of the by-law came into operation.

So, also, in sub-sec. 2 of sec. 141, and in secs. 144, 145, 146, 149, 150, 151, 152, 154, 155, 156, they appear to mean, while the prohibition of the Act or by-law referred to is in operation.

In all these cases the subject matter dealt with indicates that the words "in force" were intended to have the meaning I would give to them.

The words as used in sec. 55 have not, I think, that meaning.

The by-law in question, though by its terms the prohibition of the fifth section was "to come into operation and be of full force and effect" only on and after the next first day of May, was, nevertheless, an existing law of the municipality, and could not be repealed even before that day, for the effect of sub-sec. 1 of sec. 141 is to prohibit the passing of any repealing by-law at any time after the passing of the by-law until three years from the day of its coming into force have elapsed.

The words "in force" in this section are used, I think, as meaning "having the force of law" or as being in existence, and, in my opinion, the by-law in question had the force of law from the time of its final passing, although its prohibition did not become operative until a later day, and it certainly was an existing by-law.

Section 56, which is *in pari materia* with sec. 55, deals with the case of an addition to the limits of a municipality, and its

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provision is that by-laws of the municipality are to extend to the additional limits, and that the by-laws of the municipality from which the addition has been detached are to "cease to apply to the addition, except only by-laws relating to roads and streets," and that "these shall remain in force until repealed by the council of the municipality to which the addition has been made."

It is plain that the words "remain in force" are used as the equivalent of "continue to apply."

The corresponding words in sec. 56 are "continue in force," but, though the form of expression is changed, the meaning is the same in both sections.

The expression "the by-laws in force therein" in sec. 55 means, I think, the existing by-laws of the municipality, and has the same effect as if the section had provided, as is done in sec. 56, that the by-laws of the municipality of which the new municipality formed part, or of which it was comprised, should continue in force or continue to apply to the new municipality until repealed or altered by the council of the new corporation.

It is, besides, most improbable, I think, that the Legislature intended any such thing as, according to the contention of the appellant, the language it has used means, viz., that an existing by-law was not to affect the new municipality if the time for its coming into operation had not arrived when the new municipality came into existence.

I would dismiss the appeal with costs.

A. H. F. L.

[DIVISIONAL COURT.]

McINTYRE v. COOTE.

D. C.

1909

April 30.

Negligence—Automobile Left Standing on Side of Road—Injury to Person Driving by Horse Shying—Motor Vehicles Act—Evidence—Onus—Unreasonable Use of Highway—Contributory Negligence—Findings of Jury.

Under sec. 18 of the Motor Vehicles Act, 6 Edw. VII. ch. 46 (O.), where any loss or damage is incurred or sustained by a person by reason of a motor vehicle on a highway, the onus is imposed on the owner or driver of proving that the loss or damage did not arise through his negligence. The defendant, the owner of an automobile—a bright red one—was driving to a village, intending to stop at an hotel there and have dinner. On arriving at the foot of a hill, the road over which led to the hotel, he found that, owing to the condition of the road, it was impracticable to drive the car up the hill, so he drew it up at the side of the road about two feet from the travelled part, locking it, as required by the Act, and taking the key with him, and then went to the hotel and had dinner, remaining there some three hours. While the car was in this position, the plaintiff was in the act of driving down the hill, and, when he was about twenty rods from the car, his horse caught sight of it and shewed signs of fright. The plaintiff, notwithstanding, drove him on about a rod, when he again shewed fright; the plaintiff still urged him on, and when within a rod and a half of the car he shewed an inclination to leave the road, and, on the plaintiff pulling him back, he wheeled round and upset the carriage, whereby the plaintiff and the horse and carriage were injured. It appeared that the car could have been driven to a yard of another hotel some 600 feet away:—

Held, that there was evidence of negligence to submit to the jury as to there being an unreasonable user of the highway, and an unauthorized obstruction thereof, and therefore, a finding in favour of the plaintiff should not be disturbed; MEREDITH, C.J.C.P., dissenting.

Per MEREDITH, C.J.C.P.:—Apart from sec. 18, there was no evidence of negligence to submit to the jury; in view of the requirements of that section, it would be difficult to direct judgment to be entered for the defendant; but there should be a new trial, and the jury should be directed to find whether the automobile, in the place where it was, was an object likely to frighten horses of ordinary gentleness, and also whether there was contributory negligence on the plaintiff's part.

Judgment of the county court of Elgin affirmed.

THIS was an appeal, by the defendant, from the judgment of the county court of the county of Elgin, dated December 8th, 1908, entered on the findings of the jury, after a trial before Finkle, Judge of the county court of Oxford, sitting for the Judge of the county court of Elgin, and a jury.

The plaintiff, who was a resident of the village of Port Stanley, brought this action to recover damages for injuries sustained by himself, as well as to his horse and carriage, owing to his horse having taken fright and shied at the defendant's motor car, which was of a bright red colour, and was standing at the side of the highway in the said village, and, becoming unmanageable, ran

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away, overturning the carriage and throwing the plaintiff out, and thereby causing the injuries complained of.

The additional evidence, so far as material, is set out in the judgments.

The learned Judge submitted questions to the jury, which, with the answers thereto, were as follows:—

1. Did the plaintiff meet with the accident referred to in the pleadings by any negligence of the defendants? A. Yes.

2. What do you find the defendant negligent in? A. By leaving so long in a public place, when he could have found a nearby yard.

3. Could the motor in question be put in motion after being locked as described by the defendant, and the key being taken away. A. No.

4. Was there ample room to pass on the road in question? A. Yes.

5. Was the defendant negligent in leaving the motor on the side of the street referred to? A. Yes.

6. Was there any street the plaintiff could have taken and avoided passing the motor? A. No.

7. What damage occurred to the horse in question after the accident? A. \$50.

8. What damage was done to the buggy in question by reason of the accident? A. \$20.

9. What damage to the plaintiff by reason of injuring himself? A. \$6.

Upon these findings the learned county court Judge entered judgment for the plaintiff, with \$76 damages.

From this judgment the defendant appealed to a Divisional Court.

On January 28, 1909, the appeal was heard before MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

W. E. Middleton, K.C., for the appellant. There was no evidence of legal liability on the defendant's part. He had the right to use the highway for the purpose of driving in his motor car, and, as the state of the highway prevented him going on further, he had the right to draw it up on the side of the highway, so long as he did so clear of the travelled part, giving ample room for

vehicles to pass along the road. He complied with the requirements of sec. 14 of the Motor Vehicles Act, 6 Edw. VII. ch. 46 (O.), by locking it and taking the key with him. All that this section requires is that the car should not be allowed to stand without being locked or made fast. No one would think of imposing liability on a farmer because he leaves his waggon, even though gaudily painted, on the side of the highway, while, for instance, he goes into a store, or a doctor while making a professional visit, and there is no reason why a more stringent rule should be applied as to motor vehicles. It would be imposing a very serious burden on the owners of motor vehicles if liability should be imposed in such a case as this: *Rounds v. Town of Stratford* (1876), 26 C.P. 11. Section 18 of the Motor Vehicles Act does not stand in the defendant's way, for, on the uncontradicted evidence, he has satisfied the onus that there was no negligence on his part. The learned Judge should, therefore, have ruled that there was no evidence of negligence to go to the jury, and should have dismissed the action: *Original Hartlepool Collieries Co. v. Gibbs* (1877), 5 Ch. D. 713; *Attorney-General v. Brighton and Hove Co-operative Association*, [1900] 1 Ch. 276. There was contributory negligence on the plaintiff's part. He saw the motor car standing there and that his horse was frightened at it, yet he pressed his horse on in the attempt to get it to pass the car. In any event there should be a new trial.

Shirley Denison, for the respondent. The whole question here is, was there any evidence of negligence to go to the jury? Section 18 must also be considered, whereby the onus is cast on the owner of the motor car to shew that the accident did not occur through his negligence. It is immaterial whether the car is moving or standing still. The plaintiff, however, did not rely on sec. 18, but gave evidence of negligence as in ordinary cases. There is ample evidence of negligence to go to the jury. The evidence submitted by the plaintiff shewed that he knew the car was likely to frighten horses; that the very nature of the car—a bright red one—would presumably do so, and there is the fact that it was only two feet away from the travelled part of the highway. There was, under the circumstances, an unreasonable use of the highway and an unlawful obstruction of it. The case of *Rounds v. Town of Stratford*, 26 C.P. 11, was a very different

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case. There the action was against the municipality for the breach of their duty to keep the highway in repair, and it is pointed out there that if the action had been brought against the owner of the cart a different principle would apply. The law applicable is that laid down in *Harris v. Mobbs* (1878), 3 Ex. D. 268; *Wilkins v. Day* (1883), 12 Q.B.D. 110; *Brown v. Eastern and Midlands R.W. Co.* (1889), 22 Q.B.D. 391. The defendant did not ask to have the question of contributory negligence submitted to the jury.

April 30. MEREDITH, C.J.:—The action is brought to recover damages for injuries sustained by the respondent and caused to his horse and carriage, owing, as he alleges, to his horse having taken fright at a motor car of the appellant which was standing at the side of a highway in the village of Port Stanley, and having shied and overturned the carriage, throwing the respondent out.

The motor car was of a bright red colour, and its fittings and lamps were of brass.

The appellant had driven it from London to Port Stanley, intending to drive to an hotel called the Fraser House, where he purposed to dine. On coming to the foot of a hill, the road over which led to the hotel, he found it impracticable, owing to the condition of the road, to drive the car up the hill, and, in consequence, drew it up at the side of the road, first locking it, as required by the law, to which I shall afterwards refer, and proceeded on foot to the hotel, where he dined, and, after an absence of between three and four hours, during all which time the car remained standing where he had put it, he returned to it to find that the accident to the respondent had happened.

It appears from the respondent's own account of what occurred that his horse caught sight of the car when two-thirds of the way down the hill, the top of which, he said, was about twenty rods from where the car was, "threw his head in the air and shewed signs of fright." The respondent had noticed the car when he was at the top of the hill. Notwithstanding the signs of fright exhibited by his horse, the respondent drove him on for about a rod, when he threw up his head again and shewed signs of fright. The respondent then "urged him," and the horse shewed an inclination to leave the road. The respondent then pulled him

back to the road, and up to a post within a rod and a half of the car, when the horse wheeled and upset the carriage.

The questions submitted to the jury and their answers, omitting those as to the damages, were as follows:—

[The learned Chief Justice then set out the questions, and proceeded]:—

If the law as laid down by Denman, J., in *Harris v. Mobbs*, 3 Ex.D. 268, and by Grove and Mathew, JJ., in *Wilkins v. Day*, 12 Q.B.D. 110, and by Denman, J., and Stephen, J., in *Brown v. Eastern and Midlands R.W. Co.*, 22 Q.B.D. 391, is applicable in the circumstances and conditions of this Province, and to such a thing as a motor car, subject to what I shall afterwards say as to the question of contributory negligence, the judgment appealed from is right, and should be affirmed.

The motor car is a recognized, though modern, means of conveyance, and, subject to such restrictions as the legislature has chosen to impose with regard to its speed and operation upon highways, may be lawfully used upon them in the same way and with the same freedom as a waggon, carriage, cart, or other less modern vehicle.

For the same purpose as for wheels, the law imposes upon one using a horse the duty of securely tying him when left standing unattended upon the highway; the legislature, by sec. 14 of the Act 6 Edw. VII. ch. 46, has required that:

“14. Every motor vehicle shall be provided with a lock, key or other device to prevent such vehicle being set in motion, and no vehicle shall be permitted to stand or remain unattended in any shed, highway, park or other public place without first locking or making fast the vehicle.”

In this provision there is a recognition of the same right as one has of leaving his horse standing unattended in the highway if securely tied, in one using a motor car if he complies with the requirements of sec. 14.

No doubt, in the case of the motor car, as also in the case of a horse, the “occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which is unreasonable” is unlawful, and an action will lie for an injury resulting from it.

Apart from the possibility of a horse taking fright at the appel-

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lant's motor car, there was no obstruction or prevention of the free user of the highway resulting from its being left standing where it was.

There is no doubt that the respondent's horse took fright at it. It may have been because of its general appearance, or it may have been, as suggested by the respondent in his testimony, because of the brilliancy of its colour and the brightness of its brass fittings and lamps; but I am unable to see on what principle there is to be liability on the part of the user of the car in such a case, if there would not be liability had the vehicle been a farmer's waggon or other vehicle drawn by horses similarly adorned.

It would be a startling thing to say that a farmer, when he has driven into a country village to do business at the village store or at the village inn, may not, however brilliantly his fancy may have led him to have his waggon or other vehicle painted or otherwise adorned, after securely tying his horse, leave him standing in front of the store or the inn while he is attending to his business without incurring the risk of having to pay damages to the owner of a sensitive horse that has had the bad taste to take fright at the thing of beauty that has been left standing in the highway, and to run away, doing injury to himself, or, it may be, to his owner or to the vehicle to which he was attached.

If, as I think, the farmer would not be answerable for the damages in such a case, why should the owner of the motor car in a like case be answerable?

Having regard to the vast number of such vehicles in use all over the country, used not for pleasure only, but for business purposes, and the great increase in their use which is certain to come, it appears to me that to apply to such a vehicle the same rule as was applied, in *Wilkins v. Day*, to a large agricultural roller left on the highway, with its shafts turned up and projecting six or seven inches over the metalled portion of the highway, or, as in *Harris v. Mobbs*, to a house van, attached to a steam plough, left on the highway four or five feet from the metalled part of it, would be most unfair to the users of motor cars and the cause of serious public inconvenience.

Is a physician, who leaves his car securely fastened, as provided by sec. 14, standing in front of his patient's house while he pays his visit, to be liable for the consequences of some horse

taking fright at it and running away? Is the woman who uses hers for shopping, and leaves it in front of a shop while engaged in that sometimes difficult and prolonged occupation, to be liable, or is the merchant or manufacturer who uses such a vehicle for delivering goods to his customers to be liable because the same thing happens when the vehicle is standing at the customer's door while the delivery is going on?

The time during which the car is left standing, so far as such an accident as happened to the respondent is concerned, would appear to be immaterial, for the same thing would have occurred had the motor car been standing there three or four minutes instead of that number of hours.

As strict a rule as has been applied in the English cases does not appear to have been adopted in this Province.

Rounds v. Town of Stratford, 26 C.P. 11, was the case of a farmer's waggon, painted red and yellow, with one of its painted boards left standing up in it, which had been left on one side of the highway for ten days. The plaintiff was driving on the road, when her horses shied at the waggon, turned around, and threw her out of her waggon, causing her serious injury. The late Chief Justice Hagarty said, at p. 14: "If a farmer leave his waggon for two or three hours standing by a roadside, not interfering with the free passage of the road, is he liable to an action at the suit of a person whose horse has shied at it, because it was painted a glaring red or yellow colour, or one of its painted boards had been left standing up in it? I think this could hardly be answered in the affirmative."

There are other observations of the learned Chief Justice, in the same case, which are apposite to the case at bar, if there be, as I think there is, no difference between the case of a motor car and that of a farmer's waggon.

In the same case, when before the same Court on demurrer to the declaration—25 C.P. 123—the same learned Chief Justice said (p. 126): "It is the unreasonableness of the time that is important. It is in the nature of the user of a street in a town that it should be more or less encumbered by waggons passing to and fro, or stopping for lawful purposes; and sometimes without any person acting unlawfully, the passing and re-passing of the public may be very much interfered with."

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And further on (pp. 126-7):

"As before remarked, the leaving of a waggon in a roadway for a reasonable time in the ordinary business of a town, under proper control . . . need not necessarily give a cause of action against anyone. . . ."

"It is perfectly consistent with this declaration that the injury complained of might have equally happened from the plaintiff's horses being frightened by a waggon left for ten minutes in the roadway as for ten months. The frightening of the horses seems in no way connected with the length of time the waggon was so left."

In that case, no doubt, a different question from that involved in the case at bar was under consideration, for the action was against a municipal corporation, and was founded on its alleged breach of its duty to keep in repair the highway, but the observations of the Chief Justice and of Mr. Justice Gwynne are pertinent to the question we have to determine.

I am not prepared to hold that, in the circumstances of this case, there was any reasonable evidence to go to the jury in support of the respondent's case.

There was, besides, much in the respondent's own testimony to which I have referred to lead to the conclusion that the accident was due to his own want of care. He saw the motor car standing where it was when he was about twenty rods away from it, and he saw, also, that his horse was frightened at it, and yet he pressed him on, intending apparently to force him to go past it.

The question of contributory negligence was not, however, left to the jury, and there is no finding as to it, nor was the jury asked to say whether the motor car, placed where it was, was an object calculated to frighten horses of ordinary gentleness, though probably the answers of the jury, in view of the Judge's charge, involve a finding against the appellant on the latter question.

If it were not for the provisions of sec. 18 of the Act already referred to, I should be of opinion that there was no reasonable evidence to go to the jury in support of the respondent's claim.

Section 18, however, casts upon the owner or driver of a motor vehicle, where any "loss or damage is incurred or sustained by any person by reason of a motor vehicle on a highway," the onus of proving that the loss or damage did not arise through

his negligence or improper conduct, and it may be difficult, therefore, to direct that judgment be entered for the appellant, but, in my opinion, the appellant is entitled to have the findings of the jury and the judgment entered upon them set aside and to a new trial, and the costs of the last trial and of the appeal should be costs to the appellant in any event of the action.

It is to be regretted that further litigation should be necessary where the amount of the damage is so small, but the questions involved are of very great importance to the owners and users of motor cars, as well as to the travelling public, and it would be a regrettable thing if the rights of the owners and users of motor cars, which have been considerably restricted by legislation, should be further restricted by the findings of juries based not upon an impartial consideration of the evidence, but influenced by the well-known prejudices, especially of the farming community, shared in by horsemen who are not farmers, against such vehicles.

MACMAHON, J.:—The action is brought by a resident of the village of Port Stanley, alleging that on the 2nd of August, 1908, while driving along George street, in said village, with a horse and buggy, the horse became frightened at an automobile which the plaintiff had left standing upon the highway, and shied, and, becoming unmanageable, ran away, and the respondent was thrown from the buggy and injured, and the horse, buggy, and harness were injured and damaged. And that the said automobile was left standing on the highway for many hours, and was a nuisance and an obstruction to the said highway.

The plaintiff's evidence is that he left home about a quarter to seven in the evening, and was approaching what is known as Casey's hill, in Port Stanley, and at the top of the hill he noticed an automobile of a bright red colour, with brass fixtures, at the foot thereof, which was standing on the roadway a little off the driving track, not more than a couple of feet clear of the waggon track; that when about two-thirds of the way down the hill the horse noticed the automobile (which was standing on the south side of the road), and threw his head in the air and shewed signs of fright, that he urged the horse on, but he shewed an inclination to leave the road, and the respondent pulled the horse back

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on the road and up to a post within a rod and a half of the automobile, and the horse wheeled to the right and the buggy struck the sidewalk and upset and threw him out, when he lost possession of the lines and the horse started up the hill dragging the buggy on its side. He (the respondent) followed after the horse, and found him with his head on the sidewalk, with the buggy partly on top of him; he was pretty badly peeled about the legs, and bleeding.

George Minhinnick corroborated the respondent as to the distance the automobile was from the beaten road.

Several witnesses were called who had driven the respondent's horse to shew that he was not vicious or accustomed to shy, and as to the value of the animal and the injuries sustained, etc.

The appellant and Keith Hammond, who rode with him in the automobile, said their objective point was the Fraser House, an hotel at or near Port Stanley, and that they endeavoured to reach there by a back road, which was in such bad condition that they could not get the automobile through, and they then came around to the road leading to Casey's hill, which the automobile attempted to ascend, and, although the ascent was slight, it was said to be in a worse condition than the back road, and the ascent could not be accomplished, so the automobile was left locked at the foot of the hill, about half-past four o'clock in the afternoon, and the respondent and Hammond walked to the Fraser House, where they remained until eight o'clock that night.

The appellant says the automobile was standing as close as he could get it to the sidewalk, and not more than one foot from it, which, he said, would give the appellant ample room in the highway to pass the automobile.

The appellant had registered his automobile under sec. 2 of 6 Edw. VII. ch. 46, and a permit had been issued authorizing him to use his automobile on the highways and streets.

That the legislature considered an automobile, while in motion, as likely to frighten horses is manifest from sec. 10 of the above Act, which reads:—

“10. Every person having control or charge of a motor vehicle shall, whenever upon any public street or highway and approaching any vehicle drawn by horse or horses, or any horse upon which any person is riding, operate, manage and control such motor

vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses, and to insure the safety and protection of any person riding or driving the same . . . and if he approach any such person riding or driving any animal or horse upon any public highway outside of the limits of any city or town he shall also stop any such motor vehicle when signalled by such rider or driver so to do by raising his hand, or otherwise requested, and shall remain stationary so long as may be necessary to allow such rider or driver to pass, or until directed by such rider or driver to proceed; and, in case any animal ridden or driven by such rider or driver appears to be frightened, the operator of such motor vehicle, and any occupants of the same, shall upon request render assistance to such rider or driver in control of such animal or animals."

Section 14 provides:—

"14. Every motor vehicle shall be provided with a lock, key or other device to prevent such vehicle being set in motion, and no vehicle shall be permitted to stand or remain unattended in any shed, highway, park or other public place without first locking or making fast the vehicle."

The defendant could not find fault with the charge by the learned trial Judge, which was rather favourable to him.

[The learned Judge then set out the questions left to the jury and their answers, and proceeded]:—

The yard referred to in the answer to the second question is the yard and shed of the Franklin House, a block and a half from where the automobile was left.

Counsel for plaintiff requested the learned trial Judge to leave to the jury this additional question: "Was the motor, left as it was, likely to frighten a horse on the highway?" The learned Judge said, in reply to the request, "There is only one answer to that question." And counsel for the defendant said, "I think that is all practically included in the question your Honour has put to them."

From the reply the learned Judge made, one might suppose that, as the horse was a quiet one but was frightened and shied on seeing the bright red automobile and brass fittings, other quiet horses would also be frightened at seeing the automobile

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when approaching it, and he, therefore, concluded that it was unnecessary to put the question asked for by plaintiff's counsel.

The head note to *Harris v. Mobbs*, 3 Ex. D. 268, is:—

"A house-van attached to a steam plough was left for the night on the grassy side of a highway by the defendant. The van and plough were four or five feet from the metalled part of the way. During the evening the plaintiffs' testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the van she shied at it, kicked, and galloped kicking for 140 yards, then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterwards died from the kick so received.

"In an action under Lord Campbell's Act (9 & 10 Vict. ch. 93, sec. 1), by his executors for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably and negligently, and caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did and by the inherent vice of the mare combined, and that there was no contributory negligence:—

"Held, that on these findings the verdict and judgment must be for the plaintiffs; for the unauthorized, unreasonable, and dangerous user of the highway by the defendant was the proximate cause of the injury."

Denman, J., before whom the case was tried, at p. 271, gives the answers of the jury to the questions submitted to them, "that the van was left standing where it stood (1) unreasonably, and (2) negligently, 'considering that no effort had been made to place it in the field.'" The fourth question was as follows: "Was the death of the deceased occasioned by the van standing where it did? Or was it a mere accident? Or was it due to negligence of the deceased in his management of the mare? Or to inherent vice of the mare? Or to any two or more of these causes, or to all combined?" The jury answered: "To all combined, except negligence of the deceased and mere accident;" and, in answer to a further question, they said that they meant to find that it was due to the van being where it was and to the inherent vice of the mare combined.

In his judgment Mr. Justice Denman said:—

"The first point insisted upon was that no action would lie for an obstruction of the highway, where the person alleged to be obstructed had been using a different part of the highway, viz., the metalled part of the road, and that there was no instance to be found in the books of an action for damage caused by an obstruction to a highway, where the obstruction consisted merely of some occupation of the ground likely to cause terror to horses passing along the highway.

"It is true that there is an absence of express authority upon this point; but I think that it follows from cases which have been decided, that if there be an act done upon any part of the highway which is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage."

In *Wilkins v. Day*, 12 Q.B.D. 110, the head note is as follows:—

"The defendant farmed land on either side of a highway. His servants removed a roller from one of his fields across the highway to the gate of the opposite field, and, taking away the horses, left the roller on the greensward at the roadside, with its shafts turned up (but projecting a few inches over the metalled part of the road), intending it to remain there until it should suit their convenience to draw it away. The plaintiff's wife drove past the spot, and her pony shied at the roller, overturned the carriage, and caused her death.

"In an action under Lord Campbell's Act (9 & 10 Vict. ch. 93), the jury found that the accident was caused by an unreasonable user by the defendant of the highway:—

"Held, that the verdict was warranted by the evidence and that the plaintiff was entitled to judgment."

The action was tried before Lord Chief Justice Coleridge, who left it to the jury to say whether the placing the roller where it was and leaving it there was a reasonable user of an undoubted highway. The jury found it was not, and gave a verdict for the plaintiff for £100.

On a motion to the Court for judgment for the plaintiff for the amount of the verdict, Mr. Justice Grove said, at p. 113: "I am of opinion that the plaintiff in this case is entitled to judgment. *Rex v. Cross* (1812), 3 Camp. 224, *Rex v. Jones* (1812),

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3 Camp. 230, and *Harris v. Mobbs*, 3 Ex. D. 268, are distinct authorities to shew that all the Queen's subjects are entitled to the free and unobstructed use of the highway, and that an action will lie for an injury resulting from 'an occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which is unreasonable.' Here was unquestionably a legal nuisance, and an undoubted injury resulting from that legal nuisance. How can we say that that is not actionable? If the accident had happened whilst the person in charge of the roller was opening the gate for the purpose of passing with it into the field, it might have been said that he was fairly and reasonably using the highway. But that was not so. The roller was left standing on a portion of the highway, because it was more convenient to leave it there until the harrowing in the field was done. The defendant was not using the highway for any lawful purpose: he was making it a standing ground for his machine to suit his own purposes. The accident seems to me to have been occasioned by an unauthorized obstruction of that which was a part of the highway, and which obstruction made the highway less safe for user by the public. It must always be a question of degree."

Reference may be had to *Brown v. Eastern and Midlands R.W. Co.*, 22 Q.B.D. 391.

The jury, in answer to the second question, having, in effect, found that it was not a reasonable user of the highway to leave the automobile on the highway for such a long time when it could have been driven to the Franklin House yard, five or six hundred feet away, the case was, to use the language of Mr. Justice Grove, in the *Wilkins* case, "an unauthorized obstruction of that which was part of the highway, and which obstruction made it less safe for user by the public," and damage having resulted to the respondent therefrom, the appellant is liable therefor.

The appeal, in my opinion, fails, and must be dismissed with costs.

TEETZEL, J.:—Notwithstanding sec. 18 of ch. 46, 6 Edw. VII., placed the burden upon the defendant of proving that the plaintiff's damage did not arise by the negligence or improper conduct of the defendant, the plaintiff undertook that burden, and the jury have found in his favour.

I think the only question for this Court to determine is whether there was any evidence upon which a jury might reasonably find the defendant guilty of negligence which caused the plaintiff's damage.

The gist of the negligence charged was in improperly leaving upon the highway an object likely to frighten horses, thereby unreasonably using the highway and endangering its use to others.

Upon the evidence there can be no doubt that the motor in question, standing where it did, unattended by any one, was likely to frighten horses. An extract from defendant's cross-examination makes this plain:—

"Q. Your machine has frightened horses? A. Yes, sir.

"Q. Have you ever seen a horse frightened at your machine standing still? A. Yes, sir.

"Q. And you were sitting in the machine? A. Yes, sir.

"Q. Don't you think a horse is more likely to be frightened at a machine when there is no person in it? A. No.

"Q. With horses that are used to seeing human beings around, are they not more likely to go quietly up when a man is sitting in it? A. Possibly with a horse in a rig they would.

"Q. Your machine with men in it, would they not go quietly up with men in it? A. I do not say that they would.

"Q. In either case it would frighten the horse? A. A horse that had never seen them before."

In disposing of this appeal, it is not necessary to say that in every case where an owner leaves his motor standing unattended upon a highway he incurs liability if a horse takes fright at it. Each case must depend upon its own facts. While it might, in the ordinary course of business in a city or town, where motors are in common use, be a reasonable use of the highway to leave the motor standing unattended by the side of the street, it might not be reasonable to do so on a country road, where the sight of a motor is unusual. It might also be reasonable, even in the country, in the ordinary course of using one's motor, to leave it standing opposite a farmer's house while the owner was making a call; but it might not be reasonable to make the side of the road at the foot of a hill a standing ground for some hours, as in this case.

I think the test is, as stated by Denman, J., in *Harris v.*

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Mobbs, 3 Ex. D., at p. 272: "The real question in such cases is whether the highway has been obstructed for an unreasonable time and in an unreasonable manner, or, in other words, in such a way as to amount to something beyond a fair and reasonable use of the way."

The degree of care required by the owner of a motor or other conveyance likely, whether standing or moving, to frighten horses, must be regulated by the exigencies of the particular situation.

An interesting discussion on the rights and duties of automobile owners is found in *Indiana Springs Co. v. Brown* (1905), 74 N.E. Rep., 615, at p. 616: "It cannot be said, as matter of law, that appellant was guilty of negligence for using an automobile as a means of conveyance on the public highway. The law does not denounce motor carriages, as such, on the public ways. For, so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travellers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of conveyance, that concerns the Courts. It is improper to say that the driver of the horse has rights in the road superior to the driver of an automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting injury upon the other. And in this the quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence, or absence of other vehicles and travellers," etc.

Now, the amount of care required by the defendant in this case should, I think, be estimated by at least the following exigencies:—

1. The striking colour of his motor.
2. The width of the highway.
3. The fact that he was storing it at the foot of the hill.
4. That the locality was one in which the presence of a motor standing unattended might not be expected.
5. The time during which he expected to leave the motor unattended.

I think, having regard to these matters, there was evidence to leave to the jury on the question whether the defendant was guilty of negligence in his user of the highway.

The case of *Rounds v. Town of Stratford*, 26 C.P. 11, lays down no different rules of law, in an action against a person charged with obstructing a highway, from those settled by such cases as *Harris v. Mobbs*, 3 Ex. D. 268; *Wilkins v. Day*, 12 Q.B.D. 110; *Brown v. Eastern and Midlands R.W. Co.*, 22 Q.B.D. 391; and *Vars v. Grand Trunk R.W. Co.* (1873), 23 C.P. 143.

In the last case, which was an action for placing a hand-car on a highway, which frightened plaintiff's horses, and caused damage, Galt, C.J., at p. 148, says: "It was a matter entirely for the jury to say whether the vehicle in question was one calculated to cause the injury, and whether the place in which it was left was or was not a fit and proper place for it, so as to render the defendants guilty of negligence in so placing it."

Besides being an action against a municipal corporation, the case of *Rounds v. Town of Stratford*, 26 C.P. 11, is entirely distinguishable in its facts from the case at bar. In his judgment, at p. 18, the learned Chief Justice says: "I have not thought it necessary to discuss the principle involved in such a case as *Vars v. Grand Trunk R.W. Co.*, *supra*, where the action is against the person directly causing the injury." See *O'Neil v. Windham* (1897), 24 A.R. 341, where the difference between the responsibility of a municipal corporation and an individual who places an obstruction on a highway is pointed out.

The rule to be deduced from all the cases, I think, is that whether the defendant failed to exercise reasonable care under the circumstances, and whether, in consequence thereof, there

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was an unreasonable user resulting in an obstruction of the highway and causing plaintiff's injury, are clearly questions for the jury.

Unless, therefore, in this case the jury can be said to have come to a wrong conclusion, the judgment must stand.

I think the findings of the jury were fully warranted by the evidence. The jury also found that there was not any street the plaintiff could have taken and avoided passing the motor. In view of that finding, I do not think there was any other evidence proper to be submitted to the jury on the question of contributory negligence; at any rate, counsel for the defendant did not insist upon such a question being submitted to the jury, and I think, therefore, there is no justifiable reason for granting a new trial. I agree with my brother MacMahon in dismissing the appeal with costs.

Appeal dismissed; MEREDITH, C.J., dissenting.

G. F. H.

[LATCHFORD, J.]

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TOLMIE V. MICHIGAN CENTRAL R.R. CO.

May 14.

Railway—Carriers of Goods—Bill of Lading—Delivery of Goods without Surrender of—Condition—Claim for Loss—Time—Breach of Contract—Quantity—"More or Less."

A bill of lading of the defendants, covering wheat shipped, provided that its surrender should be required before delivery of the wheat, and that claims for loss or damage must be made in writing to the defendants' agent at point of delivery promptly after arrival of the wheat, and if delayed for more than thirty days after such delivery, or after due time for delivery, the defendants should not be liable in any event:—

Held, that the failure to make such claim in writing within the time specified did not relieve the defendants from liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the wheat to the holder of the bill of lading and to no one else.

Where, therefore, the defendants had delivered the wheat without obtaining surrender of the bill of lading:—

Held, that the defendants were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, and the words "more or less" in the bill of lading did not, in the circumstances, affect the matter.

Mercer v. Canadian Pacific R.W. Co. (1908), 17 O.L.R. 585, distinguished. ¶

THIS was an action tried by LATCHFORD, J., without a jury, at St. Thomas, on April 14th, 1909.

The facts of the case are stated in the judgment.

J. M. Glenn, K.C., for the plaintiff.

D. W. Saunders, K.C., and *W. B. Kingsmill*, for the defendants, cited *Mercer v. Canadian Pacific R.W. Co.* (1908), 17 O.L.R. 585, and the cases therein referred to.

May 14. LATCHFORD, J.:—On November 19th, 1907, the plaintiff, a grain merchant at Rodney, shipped a car of wheat from that village by the defendants' railway, consigned to the Traders Bank at Dutton, for one Hollingshead. A bill of lading was delivered to the plaintiff by the defendants' agent at Rodney. It is admitted that the form of the bill of lading has been approved of by the Board of Railway Commissioners for Canada. The plaintiff placed the bill of lading in the agency of the Traders Bank at Rodney, attaching thereto a draft at ten days upon Hollingshead for \$1,058.72, being the price of the 1,102 bushels, 50 pounds of wheat shipped, at 96 cents per bushel. The car was, however, billed as containing but 900 bushels, more or less, and the bill of lading covers only that quantity. The bank at Rodney immediately credited Tolmie's account with the amount of the draft, less exchange, and sent the draft and bill of lading to its agency at Dutton, where in the ordinary course of business Hollingshead was to accept and pay the draft, take up the bill of lading, and obtain delivery of the wheat. The bill of lading was indorsed as follows: "On payment of freight and all charges deliver to the order of Traders Bank, Dutton. (Signed) The Traders Bank of Canada, Rodney, without recourse, A. S. Winslow, manager." Hollingshead accepted the draft, but did not pay it and take up the bill of lading. Owing to some mistake on the part of the defendants' agent at Dutton, or to collusion between the agent and Hollingshead, the car of wheat was delivered, not to the Traders Bank or its order, but to Hollingshead.

In March, 1908, more than three months after the shipment, Tolmie learned for the first time that the car of wheat in question and another car, shipped and drawn against in the same manner, had been delivered to Hollingshead by the defendants. Hollings-

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head was not required in either case to produce the bills of lading to the defendants. The matter came to the plaintiff's knowledge by the bank charging back to him the amounts of the two drafts, which the bank had in the usual way discounted against the bills of lading. Tolmie went promptly to Dutton and saw there the agent of the bank, the agent of the defendants, and Hollingshead. No explanation was given him as to how the defendants had delivered the wheat without calling for the production of the bills of lading, nor was any explanation forthcoming at the trial. Some arrangement was made early in March, and the value of one of the cars, \$870, was paid by Hollingshead in three or four instalments between March 3rd and March 12th. But the car now in question was not paid for. On March 30th Hollingshead made an assignment for the benefit of his creditors. The plaintiff filed no claim with the assignee. No written notice of his loss was given by the plaintiff to the defendants until his solicitor wrote them on April 18th, 1908, that he was instructed to enter suit.

The defendants admit the delivery of the wheat to Hollingshead in breach of their contract with the plaintiff to deliver it to the Traders Bank, but say they are freed from any liability by condition 3 indorsed on the bill of lading, and forming part of their contract with the plaintiff, and that, even if they are not so released, they are relieved from responsibility owing to the negligence of the plaintiff and the plaintiff's agents, the bank, in not sooner notifying him that his draft had not been paid. In any event they say they should not be held liable for more than the value of the grain stated on the face of the bill to have been shipped by the plaintiff.

The bill of lading bears upon its face, largely in capital letters, the following clause: "If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, *the surrender of this original bill of lading, properly indorsed, shall be required before the delivery of the property at destination*, as provided by section 9 of the conditions on the back hereof." Section 9 of the conditions repeats this provision, with a modification that is not material in the present case. The word "order" is written immediately before "Traders Bank, Dutton," the party to whose order the property was consigned. The defendants admittedly did not require before the delivery of the property at its destination the surrender of the original bill of lading, and the plaintiff lost the value of the wheat shipped.

Condition 3, on which the defendants rely, is as follows: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property."

The effect of a condition regarding notice was recently considered in *Mercer v. Canadian Pacific R.W. Co.*, 17 O.L.R. 585. It was there held, following *McMillan v. Grand Trunk R.W. Co.* (1888), 16 S.C.R. 543, that where loss was sustained owing to the negligence of the defendants, they were relieved by the condition from liability when claim for loss was not made in writing within the time limited by the condition.

When notice is not given in conformity with a condition like condition 3, approved by the Board of Railway Commissioners for Canada, a carrier is, upon the authority of the cases referred to, relieved from all liability arising from loss or damage sustained in transit, or at point of delivery. But the liability for loss or damage from which they are so relieved cannot, I think, be extended to the liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the property carried to the holder of the bill of lading, and to no one else. The delivery by the defendants of the wheat to Hollingshead without the production and surrender of the bill of lading was a flagrant breach of their contract with the plaintiff, clearly and prominently expressed on the face of the bill of lading. The condition pleaded in avoidance of their contract applies only, in my opinion, to such loss or damage

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as is mentioned in *Mercer v. Canadian Pacific R.W. Co.*, and the cases there cited, and not to a violation by a carrier of his contract to deliver the goods carried only to the consignee, and then only upon surrender of the proper evidence of ownership.

Upon becoming aware of the breach, the plaintiff acted promptly and reasonably. The defendants had knowledge, through their agent at Dutton, of his efforts to obtain payment for both cars of wheat. It is not suggested that the plaintiff could have done more to that end than he was successful in doing. Nor was there, I think, any laches on the part of the Traders Bank. The agency at Rodney must have assumed from the ordinary course of business that the wheat would not be delivered unless the bill of lading was taken up by payment of the draft attached, and the agency at Dutton no doubt considered that the defendants would comply with the contract and not deliver the wheat except to the order of the indorsee. The bank appears to have acted as soon as the delivery to Hollingshead became known to it; and the defendants cannot, I think, escape responsibility by reason of any delay on the part of either agency of the Traders Bank.

I consider the defendants liable, but only for the value of the 900 bushels expressed to have been received by them for carriage and delivery. The words "more or less" should not in the circumstances be held to affect the quantity. The plaintiff or his shipper knew that the quantity of wheat shipped was 202 bushels in excess of the quantity mentioned in the bill of lading. "Under-billing," as it is called, may be a common custom among grain shippers, and carriers protect themselves against it by making the quantity expressed subject to ascertainment. But the practice is reprehensible and dishonest.

The plaintiff is entitled to recover for but 900 of the 1,102 bushels shipped. There will be judgment in his favour for \$864, with interest from December 2nd, 1908, and costs.

A. H. F. L.

[DIVISIONAL COURT.]

GAISER v. NIAGARA ST. CATHARINES AND TORONTO R.W. Co.

D. C.

1909

Railway—Carriers of Passengers—Injury to Passenger—Latent Defect in Wheel of Car—Derailment—Negligence—Liability.

May 15

The plaintiff brought this action for injury sustained by her owing to the breaking of a flange in the hind wheel of a car of the defendants, on which she was a passenger, on the occasion of an excursion, causing partial derailment and her violent ejection. The flange broke because of an inherent defect in the shape of an airhole at the time of the manufacture of the wheel. The defendants did not shew what tests had been applied by the manufacturers of the wheel, or what could be done to detect the flaw; neither did they shew that they themselves made any proper examination of the wheel before using it:—

Held, that the defendants had failed adequately to discharge their duty of examining thoroughly and skilfully the equipment furnished for the excursion, and were liable.

Judgment of Clute, J., affirmed.

THIS was an appeal by the defendants from the judgment of Clute, J., at the trial of this action, which was for damages sustained by the plaintiff Mary Gaiser by being thrown down an embankment against a signal post by reason of a car of the defendants, on which she was a passenger, leaving the rails and tilting, and for the trouble, expense, and loss of services occasioned to her husband, the plaintiff John Gaiser.

The learned trial Judge, who tried the case without a jury, assessed to Mary Gaiser damages at \$500, and John Gaiser at \$150, and gave judgment in favour of the plaintiffs for those amounts with costs.

This appeal was argued on May 11th, 1909, before BOYD, C., and MACMAHON and TEETZEL, JJ.

F. W. Griffiths, for the defendants, contended that the defect in the wheel which caused the accident was a latent defect, which no inspection would have discovered; that the wheel had been inspected on the morning of the accident; and that the defendants were not bound to prove that the wheel was properly manufactured, or to use steel wheels: *Readhead v. Midland R.W. Co.* (1867-69), L.R. 2 Q.B. 412, 4 Q.B. 379, 36 L.J.Q.B. 181, 38 L.J.Q.B. 169; *Stokes v. Eastern Counties R.W. Co.* (1860), 2 F. & F. 691; *Canadian Pacific R.W. Co. v. Chailfoux* (1888), 22 S.C.R. 721; *Badgerow v. Grand Trunk R.W. Co.* (1890), 19 O.R. 191; *Ross v.*

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Cross (1890), 17 A.R. 29; *Ferguson v. Canadian Pacific R.W. Co.* (1908), 12 O.W.R. 943.

W. E. Middleton, K.C., for the plaintiffs, *contra*.

May 15. The judgment of the Court was delivered by BOYD, C.:—This case is not free from doubt, but, if so, the general rule is that the finding in appeal should not be disturbed. I am inclined to hold that the defendants have not sufficiently discharged the onus, cast upon them by the nature of the accident, to make it manifest that they were not to blame.

The obligation resting upon the carriers of passengers for hire has been expressed in various ways by different Judges, some indicating a greater degree of care than others. As illustrations, I would refer to the language of Lindley, J., in *Hyman v. Nye* (1881), 6 Q.B.D. 685: "It becomes incumbent on (the carrier) to shew that the break down was in the proper sense of the word an accident not preventible by any care or skill:" pp. 687, 688. And, further down on p. 688, he explains thus: "A carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner . . . The expression 'reasonably fit' denotes something short of absolutely fit; but . . . the difference between the two expressions is not great." Again, in *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501, at p. 513, an earlier case, it is thus put by Montague Smith, J.: "The obligation is that (the carriage) was reasonably fit for the use made of it, so far as the exercise of reasonable care and skill could make it so." The rule is modified in the case of latent defects, but only in so far as they cannot, by reasonable skill or diligence, be discovered by any ordinary and reasonable means of inquiry and examination: *Readhead v. Midland R.W. Co.*, L.R. 2 Q.B. 412, 4 Q.B. 379, as expounded in *Francis v. Cockrell*, L.R. 5 Q.B. at pp. 503 *et seq.*

The learned Judge rightly finds that the accident was attributable to the breaking of a flange in one of the hind wheels of the car, which caused partial derailment and the violent ejection of the plaintiff Mary Gaiser. The flange broke because of an inherent defect in the shape of an air-hole at the time of the manufacture of the wheel. The flange had been worn down by considerable wear and tear—about half the period of its estimated durability—

and I would infer that it had become so thin over the air-hole in the flange that it gave way at the place and time of the accident. The car was heavily loaded, perhaps overloaded, with excursionists, and was proceeding slowly over an easy curve. But the conditions were such that the latent weakness suddenly developed, to the injury of the plaintiff.

Now, the evidence called by the company shews two points wherein I think they fail to comply with what they must prove in order to exonerate themselves. The employes of the company really did nothing in the way of testing the condition of the wheels, excepting casting an eye upon them and being satisfied that they looked all right. Now, this kind of defect cannot be detected by ocular inspection; but the witness Harris (the inspector of the defendants' cars) says that tapping would disclose the blow-hole in a cast-iron wheel if it was close enough to the surface to break through. This was in all probability the condition of the air-hole at the time the car was taken out for this service.

Again, Evans, master mechanic of the International Railroad Co., says that this kind of wheel is so cast as to prevent a blow-hole in the flange, and its presence indicates some defect in the manufacture. The superintendent, Robertson, says he believes the wheels were tested by the manufacturers (the St. Thomas company) when turned out: so he was told, but what was the test he does not know. And Pay, master mechanic of the defendants, says he does not know whether the manufacturers could have found out this blow-hole by testing. And so the matter is left at large and in doubt as to the manner of testing and the effect of testing, by the persons who are responsible for the casting of the wheel.

Now, the law is plain that purchasing from a reputable maker does not absolve the persons who use the article from legal liability for its insufficiency in the carriage of passengers. If the defendants rely upon the tests applied by the manufacturers when they purchase, well and good; if anything goes wrong, they will then fall back on the manufacturers to give the evidence of what was done or what could be done to detect the flaw. This evidence has not been adduced in the present case, and one of the gaps in the defence has thus not been stopped. The other gap left open is that the defendants themselves made no proper examination of the wheel

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before putting it in use, after being laid up for the winter and before using it on the first trip in May.

I think the evidence leads to the conclusion that the defendants failed to discharge adequately the duty devolving upon them of examining thoroughly and skilfully the equipment furnished for the excursion, and were negligent in such active diligence as the law demands: *Burrell v. Tuohy*, [1898] 2 I.R. 271.

For this reason, and on this ground alone, I would affirm the decision, with costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

C. A.

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June 23.

BRADENBURG V. OTTAWA ELECTRIC R.W. Co.

Damages—Personal Injuries—Permanent Disability—Pecuniary Loss—Quantum—Judge's Charge—Address of Counsel to Jury—Mentioning Sum Claimed.

The plaintiff, though not originally trained as a mining engineer, had by long experience become an expert examiner of gold mining locations; was 37 years of age, physically strong and healthy, and of excellent character. He was in receipt of a salary of \$6,000 a year from employers interested in gold properties, who spoke very highly of his capabilities and prospects. He was permanently disabled by injury sustained on one of the defendants cars through their negligence. A jury awarded him \$30,000:—

Held, on appeal, that the amount was not so excessive as to entitle the defendants to a new trial.

Held, also, that by a reference in the charge to the jury to \$25,000 as a sum which would not appear large to a man earning \$6,000 a year, and by a mention of the sum claimed as \$50,000, the jury were not, reading the charge as a whole, left under the impression that they were directed as to the amount they were to fix.

Held, also, that counsel for the plaintiff, in opening to the jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial.

Judgment of Anglin, J., affirmed.

THIS was an appeal by the defendants from the judgment of Anglin, J., upon the findings of a jury, at Ottawa, on January 12th, 1909, in favour of the plaintiff for the recovery of \$30,000 damages, in an action for personal injuries.

The appeal was on the ground of excessive damages and misdirection, in the circumstances mentioned below, and was argued on April 28th, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., and *F. H. Chrysler*, K.C., for the appellants.

Wallace Nesbitt, K.C., and *H. Fisher*, for the plaintiff.

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June 23. The judgment of the Court was delivered by Moss, C.J.O.:—This action is for the recovery of damages for injuries sustained by the plaintiff while riding as a passenger in a street car belonging to the defendants. In their statement of defence the defendants put in issue the charges of negligence causing the accident, but at the trial they admitted liability, and the only matter submitted to the jury was the amount of the damages. The jury awarded \$30,000, and the defendants obtained leave to appeal directly to this Court under the statute in that behalf.

At first sight the verdict appears large, but, when the circumstances as disclosed by the testimony are considered, the case assumes a different aspect.

The facts put in evidence on the part of the plaintiff were not seriously questioned, the principal witnesses in support of his own testimony were not even cross-examined, and no rebutting testimony was offered by the defendants.

At the time of the accident the plaintiff was in the employment of an association largely interested in Klondyke gold properties, and was in receipt of a salary of \$6,000 per annum. He was then 37 years of age, physically strong, healthy and active. Though not originally trained as a mining engineer, he had, by his work and experience in mining occupations in South Africa, Australia, and the Yukon, specially qualified himself as a prospector, a judge of gold-bearing soil, and an expert in examining and testing mining locations in and about the Klondyke and Yukon districts. The work he was engaged in required superior knowledge and skill of an exceptional kind, as well as undoubted probity of character. His employers had the fullest confidence in him, and in their dealings with mining properties relied and acted upon his reports. His value to his employers was increasing every year. His salary had reached \$6,000, which Mr. Treadgold, one of his employers, testified was a very ordinary salary for an ordinary mining engineer. The same witness testified that the plaintiff had a value far higher than that of the ordinary mining engineer, that he had developed, and was sure to have increased

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his salary, and that there was an absolute certainty of his being wanted by them for at least five years for exactly the same kind of work; and there is no reason to doubt that, as the plaintiff testified, he had every prospect of continuous employment, and had a bright future before him in his chosen vocation, subject, of course, to the contingencies of life to which all mankind is subject.

For reasons which appear fully in the evidence, these prospects have been hopelessly blighted. He has been discharged from his employment, and he seems wholly unqualified for any other kind of remunerative work. His employers paid his salary for about fifteen months after the accident, hoping that in time he might be able to resume the work he had been doing, but all expectation of that being the case has ended. He is now without employment or hope of any.

He necessarily endured considerable pain and suffering while under treatment and during the period of recovery, and he incurred expenses to the amount of at least \$1,200, and there is the probability of some further outlay from time to time.

It is, of course, impossible to get at the elements upon which the jury computed the amount of their verdict, but it ought to be assumed that these two items were included in those considered.

In regard to the pecuniary loss actually resulting from the injuries, the learned trial Judge, in a fair and moderate charge, impressed upon the jury that they were only to allow to the plaintiff what would be a fair and reasonable compensation for the injury sustained and the consequences that followed; and that, in considering the matter, they were to take into account what he would have probably earned in the future, having regard to the contingencies of his engagement and the chances of disease or accident or of his employment being cut off by some or one of the many causes that might arise to bring about such a condition of affairs.

There is no reason for saying that the learned trial Judge failed to instruct the jury in accordance with the decisions of the Courts in England and this Province.

In *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250, the circumstances of which resemble the present case in some

material respects, the plaintiff, a trained marine engineer, was injured by an accident on the defendants' railway in such a way as practically to put an end to all chance of his ever rising in his chosen profession, but not so as wholly to incapacitate him for some kinds of work, and the jury awarded £3,000 damages. On motion against the verdict as excessive, it was upheld by the Court of Appeal. Vaughan Williams, L.J., said (p. 258): "It is, no doubt, very difficult in the present case to estimate the damages, but I think that, taking the evidence as a whole, it is not unreasonable to say that the jury were entitled to take in to consideration as a material and substantial matter the possibility that the plaintiff would never be able to accept the position of a superintending marine engineer. . . . What, then, ought we to do if there is evidence which would justify a jury in coming to a conclusion that it was extremely doubtful whether the plaintiff would ever be able to fill such a post? Apparently from the evidence the position of a superintending marine engineer is a well-paid position. . . . Under these circumstances it is extremely difficult to form any positive opinion as to the amount of the difference in the plaintiff's prospective earnings—the difference between what he would have got if there had been no accident and what he would be able to get since the accident; and I do not see my way, by reason of the amount of the damages or of the evidence, to say that the jury have taken into consideration either topics or a measure of damages which they ought not to have taken into consideration. I cannot say that they have disregarded the rule laid down in *Rowley v. London and North Western R.W. Co.* (1873), L.R. 8 Ex. 221, that the jury may not properly assess as damages a sum of money equal to the present price or value of an annuity equal to that income which would probably have been earned by the plaintiff but for the accident."

Every word of this seems appropriate to the present case.

It is urged that the jury may have been improperly influenced by that part of the charge in which the learned trial Judge, in directing the attention of the jury to the consideration of what would be a fair and reasonable compensation, mentioned \$25,000 as a sum that might appear large to a man who was earning only a few hundred dollars a year, while to a man earning \$6,000 a year it was not so much, and also referred to the sum claimed

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as \$50,000. But, reading the charge as a whole, and that is the proper manner to deal with it, and having regard to the further explanations given when the jury were recalled, it seems plain that they were not left under the impression that they were directed as to the amount they were to fix. They were clearly instructed, and doubtless fully understood, that it was only by way of illustration that any sum was spoken of, and that they were not to consider it as an instruction or even an indication of the Judge's own view.

It was further objected that counsel for the plaintiff, in opening to the jury, should not have named the sum claimed in the statement of claim.

It is not easy to see how the bare mention of something that is fully set out in a pleading can be supposed unduly to affect the mind of a jury. One can scarcely believe that twelve intelligent men could be misled or influenced by a mere statement of that kind. In this Province it has not been considered objectionable to inform the jury as to the amount of damages claimed: see *Misner v. Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. 1064, at p. 1068. And it is questionable whether to-day the Courts in England would regard the incident so seriously as in the instance referred to by Lord Halsbury in *Watt v. Watt*, [1905] A.C. 115, at p. 118, though they may still discountenance the practice.

The appeal must be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE SHANNON.

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Will—Construction—Gift of Aliquot Share of Residue to each Child of Testator—Share of one Child to be Applied by Trustee for Maintenance—Gift to Trustee of Unexpended Balance—Right of Trustee to Receive Share.

Jan. 26.
April 22.

Residuary devise upon trust to sell and divide proceeds equally among the testator's eight children (naming them), including E., with direction to executor to pay the share bequeathed to E. to W., upon trust, to pay for proper clothing for E. while an inmate of an insane asylum, provided that, in case she died before her share was exhausted, "then I bequeath the remainder of her said share to W., to be applied by him towards the liquidation of the debt on the Roman Catholic church at C." E. died in testator's lifetime:—

Held, that, inasmuch as the children did not take as a class, but an aliquot part of the estate was bequeathed to each child, W. was entitled, notwithstanding the death of E., to receive the one-eighth share which she would have been entitled to, to be applied by him as above mentioned.

Stewart v. Jones (1859), 3 DeG. & J. 532, discussed and distinguished.

In re Pinhome, [1894] 2 Ch. 276, and *In re Whitmore*, [1902] 2 Ch. 66, discussed and followed.

Judgment of CLUTE, J., reversed.

THIS was an appeal from the following judgment of CLUTE, J., on a motion by the executor of Thomas Shannon, under Con. Rule 938, made under the circumstances mentioned in the judgment, and argued in Weekly Court on January 25, 1909.

Grayson Smith, for the executor.

W. F. Kerr, for the children and legatees of the testator.

H. T. Kelly, K.C., for the Reverend Father Whibbs.

January 26. CLUTE, J.:—Motion for construction of the will of the late Thomas Shannon, deceased. The testator, after making a bequest of the money to his credit in the bank, devised as follows:—

"3rd. I devise and bequeath all the rest and residue of my estate, real and personal, of which I may die possessed or seised of, to my said executor and trustee . . . to sell the same as soon as conveniently may be after my decease, and to divide the proceeds thereof in equal shares amongst my children, namely" (eight in all, naming them, including) "Edith Shannon . . . subject to the conditions and limitations hereinafter mentioned . . .

"4th. I hereby direct my said executor and trustee, the said James Forestell, to pay the share of my said estate hereinbefore

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bequeathed to my said daughter Edith Shannon who is an inmate of the insane asylum at Kingston, to Rev. Father Whibbs, parish priest of Campbellford, upon the following trusts: firstly, to pay so much thereof as may be necessary for providing proper clothing for my said daughter Edith Shannon while she is an inmate of the said asylum, provided, however, that in case my said daughter Edith Shannon dies before her share of my said estate so bequeathed to her is exhausted by the payments hereinbefore mentioned, then I bequeath the remainder of her said estate to the said Rev. Father Whibbs, to be applied by him towards the liquidation of the debt on the Roman Catholic church in the village of Campbellford, and I hereby direct that the receipt of the said Father Whibbs shall be a good and valid discharge to my said executor and trustee for the payment by my said executor of the share of my said estate so bequeathed as aforesaid to my said daughter Edith Shannon."

Edith Shannon died in the lifetime of the testator. It is now contended by the other children, heirs and devisees of the testator, that her share lapsed, and that Father Whibbs takes nothing under the last mentioned clause of the will.

In the earlier part of clause 3 it is clear that Edith Shannon would have taken her share absolutely, had she survived the testator, but for the conditions and limitations mentioned in clause 4, and it is this share bequeathed to her which the executor is directed to pay to Father Whibbs, upon trust, first, to pay so much thereof as may be necessary for providing her with proper clothing while an inmate of the asylum; provided, however, that in case she dies before her share of the estate so bequeathed to her is exhausted by the payments thereinbefore mentioned, then the remainder of the share is bequeathed to Father Whibbs.

It will be seen, from the wording of this clause, that the trust upon which Father Whibbs held her share was to provide her with proper clothing. This trust cannot be fulfilled in any part. There is no suggestion that in case she dies before the testator her share is to go to Father Whibbs. It is only the remainder of her share which is to go to him in case she dies before such share is exhausted by payments for the purpose for which it was given. The wording shews that the testator was uncertain as to whether there would be anything left over after his daughter was provided for or not.

But, if there was, he directed how it was to go. It is clear that the daughter was the chief object of his bounty; that, she having died in the lifetime of the testator, no part of the bequest to her could have been expended in the manner provided by the will; and there was, therefore, no remainder of the shares so bequeathed to her that could as such go to Father Whibbs.

It is urged, however, that reading the whole will, and especially the clause which shews that the receipt of Father Whibbs should be a good and valid discharge, it clearly indicates an intention of the testator that he should be a beneficiary in any event. I do not think so. The latter part of the clause clearly shews that such was not the intention of the testator, in my opinion. His receipt would be a valid receipt if the occasion arose for payment, but it is still, even in that clause, recognized as a receipt for the share of his daughter Edith Shannon.

The principal cases relied on by counsel are collected in Theobald on Wills, 6th ed., p. 751, where it is said: "The interests of those taking in remainder do not fail by the death of a tenant for life before the testator. But if an absolute interest is given and the testator then proceeds to settle the share, the question is whether what is settled is a share to which the legatee has become entitled by surviving the testator, or whether the settlement is of the share which the legatee would have taken if he or she had survived. . . . In the former case the gift fails if the legatee dies before the testator, in the latter case it does not."

For the first proposition are cited: *Stewart v. Jones* (1859), 3 DeG. & J. 532; *In re Roberts* (1884-5), 27 Ch.D. 346, 30 Ch.D. 234; and for the latter: *In re Speakman* (1876), 4 Ch.D. 620; *In re Pinhorne*, [1894] 2 Ch. 276; *In re Powell*, [1900] 2 Ch. 525; *In re Whitmore*, [1902] 2 Ch. 66. These cases are all quite different from the present, and do not help very much in the construction of the present will.

There was no life estate given in the present will. The daughter Edith, had she lived, would have been entitled to the benefit of the whole, or so much thereof as might have been required for the purposes of the trust. In my opinion it would be adding to the will, and introducing something not only not contemplated by the testator but contrary to his manifest intention, if I were to hold that, although the daughter pre-deceased him, and therefore this

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part of the will could not be carried out, yet the clause evidences an intention to make a gift of the whole share to Father Whibbs in the event of her death.

In *In re Pinhorne*, *In re Powell*, and *In re Whitmore*, a life interest only was given to the deceased child, and in other respects the wills there under consideration differ materially from the present; and no general principle in any of the cases cited was enunciated which, so far as I can see, governs the present case. See the judgment of Stirling, L.J., in the *Whitmore* case, [1902] 2 Ch. at p. 70.

It was not, I think, an aliquot part of his estate which was disposed of by the will, but the share of the daughter Edith, and, as she never became entitled to any share, the contingency has never arisen upon which only could the gift in favour of Father Whibbs take effect.

In my opinion the legacy lapsed. Costs of all parties out of the estate. Executor's costs as between solicitor and client.

The appeal of Father Whibbs from this decision was argued on March 16th, 1909, before a Divisional Court composed of MEREDITH, C.J.C.P., and MAGEE and LATCHFORD, JJ.

E. F. B. Johnston, K.C., for the appellant, referred to *Wigg v. Wigg* (1739), 1 Atk. 382; *Oke v. Heath* (1748), 1 Ves. Sr. 135; *In re Pinhorne*, [1894] 2 Ch. 276, at pp. 278-9; *Re Sheldon and Kemble* (1885), 53 L.T. 527; *In re Parker*, [1901] 1 Ch. 408.

W. F. Kerr, for the children and legatees, referred to *In re Roberts*, 27 Ch.D. 346, 30 Ch.D. 234; *Stewart v. Jones*, 3 DeG. & J. 532; *In re Pinhorne*, [1894] 2 Ch. 276; and *In re Whitmore*, [1902] 2 Ch. 66.

Grayson Smith, for the executor.

April 22. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the Reverend Father Whibbs from an order dated January 26th, 1909, made by Clute, J., on a motion by the executor of the testator, Thomas Shannon, under Con. Rule 938, for an order determining whether the appellant is entitled to any share of the estate bequeathed by the testator to Edith Shannon, and the rights and interests of the legatees under his will.

By the order appealed from it is declared that "the bequest to Edith Shannon contained in the 3rd and 4th paragraphs of

the . . . will lapsed by reason of her death in the lifetime of the testator without leaving issue."

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The will is dated May 10th, 1905. By the second paragraph the testator bequeathed to his executor and trustee the money at his credit in the Campbellford branch of the Bank of British North America, in trust to pay his debts, funeral and testamentary expenses, and to pay the residue to the appellant, who is described as the priest of the parish of Campbellford, to be applied by him, one half for masses for the repose of the soul of the testator, and the remainder "towards the liquidation of the church debt on the Roman Catholic church in the village of Campbellford."

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By the third paragraph the residue of the estate is devised and bequeathed to the executor and trustee in trust for conversion, and to divide the proceeds "in equal shares amongst my children, namely Lena Marks . . . Kate Shannon . . . Amelia Hay . . . Edith Shannon, of the city of Kingston, spinster, subject to the conditions and limitations hereinafter mentioned, Daisy Rutherford . . . Robert Shannon . . . Thomas Shannon . . . and Hugh Shannon . . ."

The fourth paragraph is as follows:—[Setting it out.]

Edith Shannon died in the lifetime of the testator and without issue. She was insane, and at the date of the will was an inmate of the Asylum for the Insane at Kingston.

My learned brother has dealt with the case upon the view that a share of the residuary estate was bequeathed to Edith, and that what is dealt with by paragraph 4 is that share, and that, as owing to Edith's death in the lifetime of the testator she took nothing under the will, there was no share upon which paragraph 4 can operate.

I am, with great respect, unable to adopt that view.

It was conceded upon the argument that the beneficiaries mentioned in paragraph 3 do not take as a class, and that if the share of Edith Shannon lapsed, it was not disposed of by the will, and that as to it the testator died intestate.

It is manifest, I think, from the provisions of the will, that the testator intended that the Roman Catholic church at Campbellford should share in the residue of his estate to the extent of receiving so much of that which may be called, and for want of better words I have called, Edith's share, as should not be required to be used

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for providing proper clothing for her while she should be an inmate of the Kingston asylum.

According to the statement of counsel, an eighth share of the residuary estate amounts to upwards of \$1,000, and the testator must therefore have had in mind that the probabilities were that very little, if any, of the corpus of her share would be required to be expended for his daughter's clothing, and that the most of it would go to the appellant for the benefit of the parish church; and it is highly improbable that, had he thought about it at all, he would have made the taking of the benefit by the church to depend upon whether or not Edith survived him,—especially as, in the event of her dying in his lifetime, unless the church was to take, her share would be undisposed of.

I see no reason why the will may not be read so as to give effect to what, as I have said, appears to me to have been the manifest intention of the testator.

Has not the testator in effect said: My executor and trustee is to divide the residuary estate into eight equal parts and to hold one of these parts for each of my children named in paragraph 3, except Edith, absolutely, but as to my daughter Edith the one-eighth which but for her insanity would have gone to her is to be paid over to the appellant to be held by him on trust to provide clothing for her while she remains in the asylum, and at her death to apply what remains towards the discharge of the church debt?

To construe the will in that way in my opinion violates no canon of construction, and is in accordance with the principle of decided cases as far as it can be said that any principle is to be extracted from them.

It is true that the testator in paragraph 3 names his daughter Edith as one of the children amongst whom his residuary estate is to be equally divided; but the addition after her name of the words "subject to the conditions and limitations hereinafter mentioned" appears to me to shew that the testator was only earmarking a share of his residuary estate for the purpose of its identification in a subsequent part of the will in which he intended to provide for the disposition of it.

Stewart v. Jones, 3 DeG. & J. 532, relied on by the respondents as supporting their contention, is, I think, clearly distinguishable. In that case the testator bequeathed his residuary estate in

trust for his children, who being a son should attain twenty-one, or being a daughter should attain or marry under that age, in equal shares as tenants in common, and declared that the share to which each of his daughters on attaining twenty-one or marrying under that age should become entitled should be held in trust for her for life and afterwards for her children; and it was held by the Lord Chancellor, affirming the decision of Vice-Chancellor Wood, that the children of a daughter who died in the lifetime of the testator took no interest.

It was the case of a gift to a class, and a lapse did not occur by the death of one of the class in the testator's lifetime. In the case at bar the gift is not to a class. In that case the gift was in terms contingent, taking effect only in the event of the beneficiary attaining twenty-one, or in the case of a daughter marrying under that age; and it was only the share to which a daughter should become entitled under the trusts that was to be held in trust for the daughter for life and afterwards for her children. In the case at bar it is not the share to which Edith becomes entitled that is to be dealt with as provided by paragraph 4, but the share bequeathed to her, and, as I have already said, bequeathed to her subject to the conditions and limitations mentioned in paragraph 4.

Stewart v. Jones was questioned by Vice-Chancellor Malins in *In re Speakman*, 4 Ch.D. 620, and the Vice-Chancellor there construed a will not very different in its provisions from the will in the former case as entitling the children of a deceased daughter to take, notwithstanding that her death occurred in the lifetime of the testator.

The Vice-Chancellor said that his view with regard to the construction of wills was that the first step was "to be satisfied what the intention of the testator really was, and then see how far the words of the will will carry that intention into effect:" pp. 623-4; and went on to say that "it would be an extraordinary thing to say that the daughter was to be tenant for life with remainder to her children if she survived her father, and not if she did not survive," and that he was quite satisfied that the testator simply intended his daughter to be tenant for life of her share. "It is true," he added, "that it was called her share, and it was her share for the purposes of division, and of ascertaining into how many shares the property was to be divided. But the intention to give

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it to the children in all cases of her death is so clear to my mind as to be beyond all possibility of doubt:" p. 624; and he concluded by stating his entire agreement with the observations of Vice-Chancellor James in *Habergham v. Ridehalgh* (1870), L.R. 9 Eq. 395, "as to the principles which ought to guide the Court in the construction of wills, that is to say, they ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal, and common-sense spirit, to give effect to his manifest intention:" p. 625.

Substituting for the statement that the intention of the testator was that the daughter should take for life and that whether her death should happen during his lifetime or after his death her children should at her death take her share, the statement that the testator Shannon's intention was that his daughter Edith should have the benefit of what was required for her clothing out of what he calls her share, and that, subject to this, upon her death, whether it should happen in his lifetime or after his death, the share should go for the benefit of the church at Campbellford, every word of the Vice-Chancellor's judgment is applicable to this case.

In re Speakman was in turn disapproved and *Stewart v. Jones* was followed by Pearson, J., in *In re Roberts*, 27 Ch.D. 346. In that case a residue was bequeathed to trustees in trust for a nephew and three nieces by name equally between them, with a provision that the share of each of the nieces should be retained by the trustees in trust to pay the income to her during her life for her separate use, without power of anticipation, and after her decease as to the capital upon trust as she should by will appoint, and in default of appointment upon trust for her children . . . One of the nieces died in the lifetime of the testator, leaving an infant daughter, and it was held that the share of the deceased niece had lapsed and that there was an intestacy as to it.

The view of the learned Judge was that that which the testator directed should be settled was the share of the niece, that, as the niece died before the testator, she could not take any share under the will, and that there was therefore no share to settle, and her child could take nothing under the will.

The judgment of Pearson, J., was affirmed by the Court of Appeal, 30 Ch.D. 234; but Lindley, L.J., in delivering his

judgment, said that counsel was justified in saying that the case was distinguishable from *Stewart v. Jones*; and it appears clearly, from all the judgments in the Court of Appeal, that the conclusion which was come to was reached because of various provisions of the will which were thought to shew that it was the intention of the testator that the niece whose share was to be settled was to be a niece who was to die after and not before him.

Stewart v. Jones and *In re Roberts* were considered and distinguished by Chitty, J., in *In re Pinhorne*, [1894] 2 Ch. 276; the trust there was for the testator's four sisters by name, in equal shares, and the trustees were directed to retain the share of each sister upon trust, to pay the income to the sister for life, with power to appoint a life interest to her husband, and after her death for her children contingently on their attaining twenty-one or marrying, and in default of children for her next of kin. One of the sisters died in the testator's lifetime, leaving children, and it was held that the share of the deceased sister had not lapsed, and that her children were entitled to it contingently on their attaining twenty-one or marrying.

The reasoning of the learned Judge proceeded on the same lines as that of Vice-Chancellor Malins in the *Speakman* case, and in distinguishing *In re Roberts* he says that the key of the judgment was to be found in what Lord Justice Lindley said, "You cannot read it as a settlement of one-fourth, but as a settlement of the share which the niece takes:" p. 280; and every word of the judgment of Chitty, J., is, in my opinion, applicable to the will in question.

In re Pinhorne was followed by Cozens-Hardy, J., in *In re Powell*, [1900] 2 Ch. 525.

In *In re Whitmore*, [1902] 2 Ch. 66, the question was as to the meaning of the words "the share" used by the testatrix to describe what she had given to her sister Charlotte in providing for the manner in which it was to be held and enjoyed and for its destination in certain events. The testatrix directed her residuary estate to be held in trust for such of her brothers and sisters, excluding one sister, but including two other sisters if they should marry, as should be living at the decease or marriage of the surviving or last marrying sister in equal shares as tenants in common, with a proviso that if at the

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period of distribution her three brothers or any of them should be dead or either of her sisters Sophia and Catharine should be dead having previously married, and there should be living any child or children of any of them who should then have attained twenty-one or should then have married or should afterwards marry, the children should take such part or share of the estate as their parents would have been entitled to if living. The testatrix further declared that, with respect to the share of her sister Charlotte, it should be held in trust to pay the income to her for life for her separate inalienable use, and that after her decease the capital "of the same share" should be held in trust for her children as she should appoint, and in default of appointment "in trust for and to vest in the child, if only one, or all the children, if more than one, of the said Charlotte Harrison, who, being a son or sons, shall have attained or shall attain the age of twenty-one years or die under that age leaving issue living at his death or at their respective deaths, and who, being a daughter or daughters, shall have attained or shall attain that age or shall have married or shall marry under that age, and, if more than one, in equal shares;" and, in default of any son or daughter becoming entitled, the testatrix directed that "the same share" should be held in trust for the persons entitled to the other shares of her estate and in the same proportions. Charlotte Harrison did not survive the period of distribution, and it was contended, and Byrne, J., held, [1901] W.N. 146, that she did not take any "share" in the trust fund, and that consequently her children and their representatives could take nothing, but that there was an intestacy.

The Court of Appeal took a different view, and reversed the judgment of Byrne, J., holding that, upon the true construction of the will, by the expression "the share of Charlotte Harrison" was meant an aliquot part of the estate of the testatrix, and not merely the share which she would have taken if she had survived the period of distribution, and that consequently the representatives of the deceased children of Charlotte were entitled to the residue. *In re Roberts*, *In re Pinhorn*, and *In re Powell* were referred to, the first as binding on the Court, and the other two with approval.

These cases, in my opinion, amply warrant the conclusion which I would have reached independent of authority as to the

true construction of the will, *viz.*, that the one-eighth share of the residuary estate to which Edith would have become entitled, subject to the conditions and limitations mentioned in paragraph 4, had she survived the testator, did not lapse, owing to her death in the lifetime of the testator, and that in the events that have happened the appellant is entitled to receive the one-eighth share in trust to apply it towards the liquidation of the debt on the Roman Catholic church at Campbellford.

I would therefore reverse the judgment of my brother Clute and substitute for it a declaration and judgment in accordance with the opinion I have expressed.

The costs of all parties should be paid out of the fund.

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[BRITTON, J.]

FRITZLEY V. GERMANIA FARMERS' MUTUAL FIRE INSURANCE CO.

1909

Fire Insurance—Application—Untrue Answer—Warranty—Variation of Statutory Condition—Materiality to Risk—Invalidity of Variation—Statutory Condition No. 1—Non-Disclosure of Vendors' Liens—Completed Contract for Insurance—Withdrawal of President and Manager's Authority to Issue Policies.

May 13.

The first statutory condition makes fire insurance of no force in respect to property in regard to which the insurer has misrepresented any circumstance material to the risk. By variation or added condition, the insurers declared, in their policy sued on in this action, that any mortgage or other lien should be deemed material to the risk within the above condition:—

Held, that it still remained for a Judge or jury to determine the fact of the materiality or immateriality; and that if the added condition was intended otherwise, it could not be upheld as reasonable or just.

The insurance in question was on the "ordinary contents" of a barn and stable:—

Held, that the fact that there were vendors' liens on implements, part of such contents, which were not communicated to the insurers, was not material to the risk; and the fact that the plaintiff's application for insurance contained a warranty of the truth of his answers therein, and expressly stated that any untrue answer should avoid the policy, and the plaintiff falsely stated therein that nobody had any legal or equitable claim to the property insured, made no difference, the insurers not having made the warranty any part of the policy or of the contract of insurance, save as above mentioned.

At the annual meeting of the insurance company, the authority to issue policies was taken from the president and manager and vested in an executive committee:—

Held, that this applied only to policies to be issued on future applications or then unaccepted applications, and not to cases where, as here, there was a complete contract to insure.

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THIS was an action on a policy of fire insurance, and was tried at Owen Sound by BRITTON, J., without a jury, on March 18th, 1909.

The circumstances of the case are stated in the judgment.

W. Kingston, K.C., for the plaintiff.

A. G. MacKay, K.C., and *Anson Spotton*, for the defendants.

Reference was made to the following authorities: *Reddick v. Saugeen Mutual Fire Insurance Co.* (1887-8), 14 O.R. 506, 15 A.R. 363; *McKay v. Norwich Union Insurance Co.* (1895), 27 O.R. 251; *Coulter v. Equity Fire Insurance Co.* (1904), 7 O.L.R. 180, 184; *Ballagh v. Royal Mutual Fire Insurance Co.* (1880), 5 A.R. 87; and the Insurance Act, R.S.O. 1897, ch. 203, secs. 144, 168, 169, and 171.

May 13. BRITTON, J.:—The plaintiff effected with the defendants an insurance for \$500 upon ordinary contents of dwelling-house while contained therein, and \$1,000 upon ordinary contents of barn, stable, and attachments while contained in the same. These buildings were described in the policy as standing upon the west half of lot 53 in the second concession of Normanby. The policy is dated the 8th February, 1908.

On the 17th October, 1908, the barn and its contents were destroyed by fire, and the plaintiff claims, and has brought this action to recover, \$1,000, alleging his loss to be greater than that sum.

The defendants specially rely upon the following as matters of defence:—

1. That in plaintiff's application for insurance he agreed that the questions and answers should form the basis of the contract of insurance, and that, in answer to the question, "Has any other person any legal or equitable claim to or in the personal property therein mentioned," the plaintiff said "No." And it is alleged that this answer was then false to the knowledge of the plaintiff. It is alleged that, at the time of the application, other persons had legal and equitable claims to this personal property.

2. That the misrepresentation and suppression of the facts as to these legal and equitable claims were material to the risk

upon the negotiation for the contract of insurance, and so rendered the policy void.

3. Upon this defence of misrepresentation the defendants plead the first one of many conditions indorsed upon the policy as "variations in conditions and additions."

4. The defendants contend that the plaintiff incumbered part of the property insured by giving a chattel mortgage thereon, on the 3rd July, 1908, and that this, without notice to the defendants, rendered the policy void, under the first and third statutory conditions of the policy.

5. Further, the defendants say that the proofs of loss and a false and fraudulent statement by the plaintiff were such as to disentitle the plaintiff to recover, the proofs of loss being, as the defendants say, a false and fraudulent over-valuation of the plaintiff's loss.

6. The defendants say that they did not issue the policy. If any such was issued, it was done by some officer of the defendants' company, who had no authority, and without the knowledge or consent of the defendants.

7. And, lastly, the defendants say that, if the plaintiff is entitled to recover, he is entitled to recover only two-thirds of his interest in the value of the goods destroyed by fire.

As to the first defence, it is quite true that the plaintiff's application for insurance contains a warranty of the truth of all his answers to the questions asked, and it is expressly stated that any untrue answer shall void the policy. But the defendants have not made the warranty any part of the policy or the contract of insurance, except in the way I shall mention. It is not mentioned at all in the body of the policy.

It is not one of the statutory conditions that any untrue statement in the application shall make the policy void.

It is not so made void by any of the varied or added conditions.

The first variation or added condition upon which the defendants rely alleges that any incumbrance by way of mortgage, life lease, execution, or other lien, shall be deemed "material to be made known to the company" within the provisions of the first statutory condition. The first statutory condition is as follows:—

"If any person or persons insures his or their buildings or

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goods, and causes the same to be described otherwise than they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made."

This condition does not deal at all with the warranty of the truth of any statement of the insurance in the application by way of answer to the questions or otherwise.

If that added condition is intended to prevent any Judge or jury, before whom an action on the policy is being tried, from determining the fact of the materiality of the answer or statement, then I hold that condition not to be reasonable or just.

Not embodying this condition as to untrue statements in the policy distinguishes this case from such cases as *Thomson v. Weems* (1884), 9 App. Cas. 671; *Venner v. Sun Life Insurance Co.* (1890), 17 S.C.R. 394.

In *Stott v. London and Lancashire Fire Insurance Co.* (1891), 21 O.R. 312, the action was brought upon the interim receipts, and there was the clear warranty in what was the contract sued upon. See *Butler v. Standard Fire Insurance Co.* (1879), 4 A.R. 391; *Ballagh v. Royal Mutual Fire Insurance Co.*, 5 A.R. 87; *Reddick v. Saugeen Mutual Fire Insurance Co.*, 14 O.R. 506; *McKay v. Norwich Union Insurance Co.*, 27 O.R. 251; *Coulter v. Equity Fire Insurance Co.* (1904), 9 O.L.R. 35; *Davidson v. Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394.

In this case I am of opinion and so find that the mere fact that on some of the chattels there were so-called vendors' liens was not material to the risk under the circumstances of this case. What is material to the risk is a question of fact to be decided in each particular case. There is no general rule that can be applied in a case of this kind. There are things obviously material to the risk about which, whenever they obtain, there can be no doubt whatever.

The application for insurance was on ordinary contents of the barn and stable No. 1, and contents of the dwelling-house. The latter was insured, but not destroyed. There is nothing

in the application to define what "ordinary contents" of barn and stable were.

Looking at the policy in the variations in condition No. 6, the term "ordinary contents" is explained in the note, and, as applied to barn and stable, covers farm produce generally, live stock (excepting thoroughbred stock and stallions used for breeding purposes only, which must be especially insured). Farm implements (threshing machines, grain crushers, and cream separators) must also be especially insured.

In that definition the principal articles in the barn in question were the crops. Then, by the application, the loss, if any, was to be made payable to this plaintiff as his interest might appear. The implements on which the lien attached were purchased by the plaintiff, and, upon their destruction by fire, the plaintiff remains liable to the manufacturer or vendors of these, just as before.

I have no difficulty in arriving at the conclusion that any alleged misrepresentation or erroneous answer was not material to the risk in this case. I further notice that in this application, which was drawn up by the agent of the company, the plaintiff, when asked the question "Does the applicant hold the title to the real estate above mentioned in fee simple?" answered "Yes." This is not true, and the agent knew it was not true, because he knew it was occupied by the applicant as tenant at a rental of \$125 per year. This was a mere slip, as also was a misdescription of the number of the lot. The defendants have not sought to take advantage of these mistakes.

The plaintiff did, on the 3rd January, 1908, execute in favour of a so-called Wisconsin corporation, called the International Harvester Company of America, having an office in Chicago, a chattel mortgage on a good part of the property covered by the policy in question, for the sum of \$144. The plaintiff says he did not know that the paper he signed was a chattel mortgage, and there is a good deal about the way it was obtained and the contents of the instrument that gives probability to the plaintiff's statement.

The giving of this chattel mortgage is pleaded as rendering the policy void under the second and third statutory conditions. I do not so read these conditions. The first condition, if widened by the first condition of the variations, only applies to the extent

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of making such a mortgage material to the risk, and so notice of such must be given at the time of application for insurance. Here the mortgage was subsequent to the application.

The third condition, which speaks of a change material to the risk, has no application, this not being a change material to the risk. And in so far as the first of the variations in conditions attempts to alter or widen the first or third statutory condition, I disallow it, holding said variation in condition not to be just or reasonable.

I find that the plaintiff was not guilty of fraud in his proof of loss. He did not, in my opinion, knowingly make any false or fraudulent declaration to prove or in support of his loss.

After the fire the plaintiff was called upon by Andrew Shenk, the president, and Henry Mayentz, a director, representing the defendants. The plaintiff then truthfully, so far as he remembered at the time, gave these men all the information necessary to put them on inquiry as to the extent of his loss. The plaintiff, on his then enumeration, estimated the loss at considerably less than he afterwards stated.

The defendants did not offer to settle, but treated the plaintiff with suspicion. They put him to strict proof of his loss. The plaintiff then sought assistance, and made up his loss at considerably more than the amount first claimed, and more than I find the actual money value of his loss to be, but that is a far remove from fraud. In my opinion no fraud has been shewn. It is not a case, upon the evidence, of even well-founded suspicion. The origin of the fire is unknown, but nothing implicating the plaintiff has been shewn. I think he intended to answer all questions truthfully.

I find that the policy issued under the corporate seal and signed by the president and manager of the defendant company is valid and binding.

The defendants denying the authority of the president and manager, on the 8th May, 1908, to sign, seal, and deliver the policy, is hardly worthy of the company. If not a dishonest defence, it borders closely upon it.

The policy issued in pursuance of the application made on the 7th November, 1907. The premium note was given on that day. The persons who signed the policy could on that day or

any day after, up to the 7th February, 1908, properly do so, and were authorised so to do.

It is said that, on the 7th February last, at the annual meeting of the defendant company, the authority of the president and manager to issue policies was cancelled and vested in an executive committee. That, in my opinion, would apply only to policies to be issued on future applications or then unaccepted applications. This contract was complete, and the defendants recognised it as such.

At the time of the fire the defendants not only held the plaintiff's premium note, but the money the plaintiff paid on the 15th October, 1908, as the first payment on this note.

This was accepted by the defendants, and the receipt signed by the manager states this payment to be "first fixed payment on premium note or undertaking for insurance under policy No. 8456." This is the policy sued upon.

The defence that the plaintiff is entitled to recover only two-thirds of the actual value of the property destroyed by fire, and not to exceed \$1,000 in all as to the contents of the barn, stable, and attachments, must prevail. The application clearly states that it is for insurance against loss by fire not exceeding two-thirds of the actual cash value of the unmentioned property at the time of the fire.

Variations in condition No. 6 provide for the limitation in the policy.

Graham v. Ontario Mutual Insurance Co. (1887), 14 O.R. 358, holds such a condition just and reasonable. Also see *McIntyre v. East Williams Mutual Fire Insurance Co.* (1889), 18 O.R. 79; *Wanless v. Lancashire Insurance Co.* (1896), 23 A.R. 224; *Eckardt v. Lancashire Insurance Co.* (1898-1900), 29 O.R. 695, affirmed in appeal 27 A.R. 373, 31 S.C.R. 72.

As to the actual cash value of the property destroyed by fire there is certainly a wide discrepancy in the evidence. The plaintiff gives as his first estimate \$953.65. The plaintiff's proofs of loss made the amount \$1,332.05. There is an agreement as to certain items amounting to \$140.80, but beyond this the parties are far apart. The defendants, however, concede that if the plaintiff is entitled to recover at all, he is entitled to recover on the basis of a valuation of the property destroyed at \$661.49.

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In this latter amount the horse is put down at \$15, while the plaintiff asserts a value of \$135. Both, in my opinion, are quite wrong in their estimate.

Without imputing motives to those who deposed to the value of the horse, I think \$15 an absurdly low estimate. Other things were valued by the defendants at so low a price as to warrant my belief that a larger sum could have been obtained at a forced auction sale. The actual cash value of these articles, within the meaning of the policy, is what would be paid for them by a man wanting the articles and having the money to pay, but not compelled to buy, to a person having the articles for sale, and willing but not compelled to sell.

Upon the evidence I find the total value of all the articles destroyed by fire and covered by the policy at \$1,100.85.

Two-thirds of \$1,100.85 equals \$733.90.

Interest should be allowed at 5 per cent. per annum from date of delivery of proof of loss, say $4\frac{3}{4}$ months from 24th December, 1908, amounting to \$14.52, making in all \$748.42, for which amount I direct judgment for the plaintiff against the defendants, with costs.

No difficulty need arise by reason of orders given by the plaintiff upon the defendants for any part of his money, as the defendants, disputing the claim, presumably did not accept the orders.

Very likely some arrangement may be arrived at so that the defendants will be fully protected either by money being paid to the plaintiff's solicitor, upon his undertaking to apply it properly, or by the amount or part of it, except costs, being paid into court.

The matter may be spoken to, on settling the accounts, if the defendants so desire

A. H. F. L.

[IN THE COURT OF APPEAL].

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Street Railway—Assumption of Ownership by Municipality—Award of Arbitrators—Principle of Valuation—Allowance for Value of Franchise—Allowance for Compulsory Taking—Street Railway Act, sec. 41.

Arbitrators were appointed under the Street Railway Act, R.S.O. 1897, ch. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of sec. 41 (1) of the Act,* by a town corporation, part of the railway being laid within the town.

The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the working thereof," and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever," in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the contention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value:"—

Held, Moss, C.J.O., dissenting, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellants' railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value.

Stockton and Middlesbrough Water Board v. Kirkleatham Local Board, [1893] A. C. 444, distinguished.

Right of owner to allowance of 10 per cent. as for compulsory taking discussed.

Judgment of BRITTON, J., reversed, and award remitted to the arbitrators for reconsideration.

THIS was an appeal by the company from the judgment of BRITTON, J., dismissing their appeal from the award of arbitrators appointed to determine the value of their railway and of all the real and personal property in connection with the working thereof, under sec. 41 of the Street Railway Act, R.S.O. 1897, ch. 208.

The arbitrators made their award on the 29th December, 1906,

* R. S. O. 1897, ch. 208, sec. 41.—(1) No municipal council shall grant to a street railway company any privilege under this Act for a longer period than twenty years, but at the expiration of twenty years from the time of passing the first by-law which is acted upon, conferring the right of laying rails upon any street, or at such earlier date as may be fixed by agreement, the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration.

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fixing the value of the railway and the said real and personal property at the sum of \$75,200.

The portion of the award which is material in respect of the appeal is as follows:—

“In arriving at the above value, we have valued the railway as being a railway in use and capable of being used and operated as a street railway, and have not allowed anything for the value of any privilege or franchise whatsoever, either in the town of Berlin or in the town of Waterloo.

“It was argued before us, on behalf of the street railway company, that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount, so as to reach the correct value of the railway and the real and personal property in connection therewith. We have not been able to assent to that contention, and have not reached our valuation as above in any way on that basis, but have considered only the actual present value.

“It was argued, on behalf of the Berlin and Waterloo Street R.W. Co., that if our valuation was upon actual present value, we should add to the amount found by us as such present value ten per cent. of that value as for compulsory taking. We have not been able to accede to this contention, and have not added anything on that account.”

From this award the company appealed, and the appeal was argued before BRITTON, J., in Weekly Court, on the 13th February, 1907.

H. J. Scott, K.C., for the appellants.

H. L. Drayton and *J. A. Scellen*, for the respondents.

March 8, 1907. BRITTON, J.:—This is an appeal by the Berlin and Waterloo Street R.W. Co. from an award of three arbitrators, dated the 29th December, 1906, awarding to the railway company \$75,200 for their railway and property.

The application is to set aside the award, or to increase the amount, or to revoke the submission, or for some order by way of relief, upon grounds stated in the notice of motion. Some of the questions raised have already been determined.

Upon a special case stated by the arbitrators for the opinion

of the Court, MacMahon, J., decided that sec. 65 of 6 Edw. VII. ch. 31 prevents the repeal of ch. 208, R.S.O. 1897, as affecting the present reference, and, further, that the parties are bound by the agreement between them dated 21st June, 1906. See *Re Town of Berlin and Berlin and Waterloo Street R.W. Co.* (1906), 8 O.W.R. 284.

That decision is binding upon me. Upon the argument nothing was abandoned, and every objection was formally presented.

The main question presented, as I regard it, was that the appellants were entitled, as part of the value of their railway and as part of the property used in connection therewith, to the franchises, operating agreements, and other contract privileges and benefits incidental thereto.

It was conceded upon the argument that the appellants cannot succeed unless this case is distinguished on principle, or by reason of the difference in the Acts which govern, from *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444 (House of Lords).

In the *Stockton* case the special Act provided that when so required by the sanitary authority of any such outlying district the board should sell to such sanitary authority the mains, pipes, and fittings belonging to the board within that district "at a price to be fixed, in default of agreement, by an arbitrator"; and after such sale the board should cease to supply water within the district. It was held that upon the true construction of the special Act, the word "price" meant price, and not compensation; and that in fixing the price the basis of calculation should be merely the value of the mains, pipes, and fittings regarded as plant *in situ* capable of earning a profit, and that the arbitrator must not include, in fixing compensation to the board, anything for the loss of the right to supply water within the outlying district.

It was argued that in the *Stockton* case the question was one of sale and purchase, and that by sec. 41 of ch. 208, R.S.O. 1897, there is no right given to the municipality to buy, and no obligation on the part of the railway company to sell; but it is here an assuming "the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration."

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If there is any distinction between purchasing and assuming the ownership of any property, I do not think it assists in determining the question of what the municipality, upon purchasing, or upon assuming the ownership, is to pay for. The municipality is to pay the value of the railway and all real and personal property in connection with the working of it. How is this value to be ascertained?

The transaction is practically one of purchase. Section 42 of the Act (ch. 208, R.S.O. 1897), dealing with the case of where a company's line or lines is or are situated in two or more municipalities—and that is the present case—gives to the municipality in which is the greater mileage “the right to exercise the power of purchase herein conferred,” and declares that “the corporation purchasing shall thereafter possess all the powers and authority theretofore enjoyed by the company.” Again, sec. 45 speaks of the municipal corporation purchasing, and gives power to “transfer its rights to its railway lines or any of them, and the whole or any part of the plant of the railway, to any railway company authorized to operate a railway,” subject again to the provisions of sec. 41 as to such railway being assumed by a municipal corporation entitled under that section.

Before the arbitrators Mr. Kappele contended that it was a sale of the railway—a sale of it as a going concern.

In *Re City of Kingston and Kingston Light Heat and Power Co.* (1902-3), 3 O.L.R. 637, 5 O.L.R. 348, affirmed by the Privy Council on the 20th April, 1904, the words “all the works, plant, appliances, and property of the company used for light, heat, and power purposes, both gas and electric,” were held not to include anything “for the value of the earning power or franchise of the company.”

In *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, the decision was really upon the following words, “shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district.” As I read that case, the decision would have been the same if the words in brackets in the Act, which I have left out, were not there at all.

It was held that the word "tramway" was used in the Act as meaning the structure laid down on the highway, and nothing more; therefore the value of the tramway must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for "depreciation, and that rental value must not be taken into consideration."

The elaborate judgments in that case cover the whole ground, but I do not need to make further citations therefrom. On principle I am unable to distinguish it from the present case. The arbitrators were right in valuing "the railway as being a railway in use, and capable of being used and operated as a street railway." In that sense the railway was considered as a "going concern," but, apart from that, nothing was allowed for the value of any privilege or franchise in Berlin or Waterloo. The arbitrators declined to adopt as the principle of valuation the capitalization of the net earning power of the railway.

In my opinion, the arbitrators were right in doing as last mentioned, and they were also right in refusing to add ten per cent. to the value found. There is no authority, either under the statute applicable in this case, or under the agreement between the municipality and the company, to make such addition.

As to amount, the arbitrators appear to have gone very fully and carefully into the matter. The evidence is very voluminous, and there is not as to any particular item or items anything upon which I can disturb the findings.

The appellants object that the time within which the municipal corporation of the town of Berlin were to assume the ownership of the property intended to be affected by the award had expired before the publication of the said award.

The appellants are not in a position to urge this objection on the present application—if at all. They proceeded with arbitration proceedings down to the making of the award. I must deal with the objections as objections to an award made in due course and as authorized by the Act.

The appellants are not, in my opinion, entitled to succeed.

Motion dismissed with costs.

From this judgment the company, by special leave, appealed directly to the Court of Appeal, and the appeal was heard on

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the 18th and 19th May, 1908, by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

James Bicknell, K.C., and *W. D. McPherson*, K.C., for the appellants. The Court is asked to vary the award or to determine the principles on which it should be made. The agreement for arbitration is set out in the statute 7 Edw. VII. ch. 58, which gave the town power to take possession of the road, and which was practically a Confiscation Act. Nothing has been allowed by the arbitrators for the rights of the company in Waterloo, where they had what was practically a perpetual franchise. The method of valuation adopted by the arbitrators was erroneous. The entire undertaking was to be taken over—a fact which distinguishes this case from the English and Scotch cases which were relied on in the Court below. The case of *Toronto Street R.W. Co. v. City of Toronto*, [1893] A.C. 511, relied on by the respondents, is distinguishable, it being a case of contract, while here it is a question of a right given by statute. The English and Scotch cases relied on and cited by the respondents in their reasons against appeal (*Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444, *London Street Tramways Co. v. London County Council*, [1894] 2 Q.B. 189, [1894] A.C. 489, *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456), are also clearly distinguishable, as they all turn upon the strict construction of the language used in the statutes which govern them, and here the language is different. A careful examination of the last two of these cases shews that the decisions turned to a large extent on the point that the arbitrators were by the express terms of the statutes forbidden to make any allowance for “the past or future profits of the undertaking,” words which are not referred to in the judgment appealed from, but which had a most important bearing upon these decisions. The *Kirkleatham* case, on which so much stress is laid in the judgment of Britton, J., is referred to by Henn Collins, J. (cited by Lord Ashbourne in [1894] A.C. at p. 483), as shewing “the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials.” Here the respondents get the entire undertaking and rights of the company, so the case cited has no application. The construction asked for by the town is

unjust to the company, which, after passing through a number of "lean years," will, if this judgment is affirmed, be deprived of a great part of the fruits of their enterprise. The town has taken all that we have and should pay for it. The arbitrators do not deal with the railway as a thing "in use" when they simply ascertain and add up the value of the rails, spikes, etc., of which it is composed. No allowance has been made for expenses in connection with the appellants' services in superintending the construction, nor for interest on moneys invested, and for these reasons the award should be remitted to the arbitrators for reconsideration.

H. L. Drayton, K.C., and J. A. Scellen, for the respondents. Under the Consolidated Municipal Act of 1903, sec. 569, the municipality has the powers of a street railway corporation, and is also entitled to go into other municipalities. The powers of English municipalities are not so great. The respondents rely upon the *Toronto Street Railway* case already cited, and refer to the judgment of Robertson, J., in that case, *Re Toronto Street R.W. Co.* (1892), 22 O.R. 374, at p. 384, and to the judgment of Maclellan, J. A., in the same case on appeal, *In re City of Toronto and Toronto Street R.W. Co.* (1893), 20 A.R. 125, 138, especially at p. 139, where it is held that the word "railway" does not necessarily mean the "undertaking" of the company. The principles laid down in these judgments were confirmed by the Privy Council and are on all fours with those which govern the present case. Reference is also made to *Re City of Kingston and Kingston Light Heat and Power Co.*, 5 O.L.R. 348, and also to the judgment of Lindley, L.J., in the *Kirkleatham* case, reported in [1893] 1 Q.B. 375, at p. 384. If the revenue of the company is capitalized as suggested by the appellants, it would be giving them, in effect, a perpetual franchise, to which the cases clearly shew they are not entitled. As to the claim made for expenses and interest, these points are answered in the reasons against appeal, and the arbitrators may report, if they have allowed for these items, as to the principle involved in which there was no issue between the parties, but simply as to the amount.

McPherson, in reply.

December 31, 1908. GARROW, J.A.:—This is an appeal by the street railway company from the judgment of Britton, J.,

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dismissing an appeal from the award of a board of arbitrators appointed by the parties to value the street railway upon its assumption by the corporation of the town of Berlin.

Several matters were argued before us by the learned counsel for the appellants, but, as the reference and the award were both confirmed by statute (see 7 Edw. VII. ch. 58 (O.)), it is quite beyond question, I think, that the only matter open is the one reserved by the last section (6) of that statute, namely, the amount, which it is there said may be varied on appeal. And the contest is not so much as to the allowance or disallowance of particular items, except in one or two instances, as to the principle upon which the arbitrators proceeded.

The language of the statute, R.S.O. 1897, ch. 208, sec. 41 (1), is as follows: “. . . the municipal corporation may, after giving six months’ notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof to be determined by arbitration.” The arbitrators determined that the sum of \$75,200 “is the actual present value,” and in the award they say that they declined to accede to the contention of the company that the proper mode to proceed was to ascertain the present net earnings and to capitalize that amount. They also say that in arriving at that value they valued the railway as “a railway in use and capable of being used and operated as a street railway,” but did not allow anything for the value of any privilege or franchise whatsoever, either in the town of Berlin or in the town of Waterloo.

These abstracts from the award sufficiently indicate the appellants’ contentions upon the question of value, the same arguments having apparently been addressed to the arbitrators as were afterwards addressed to us.

Britton, J., agreed with the arbitrators, and dismissed the appeal, largely upon the authority of the case in the House of Lords of *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444, which, in his opinion, could not be distinguished. There a water board was constituted by a special Act with the right of supplying water within the boundaries of two boroughs and certain districts beyond these boroughs, “provided that when so required by the sanitary authority of any

such outlying district the board should sell to such sanitary authority the mains, pipes, and fittings belonging to the board within that district at a price to be fixed, in default of agreement, by an arbitrator; and, after such sale, the board should cease to supply water within such district." And it was held that the word "price" did not mean "compensation," and that, in fixing the price, the basis of calculation should be merely the value of the mains, pipes, and fittings regarded as plant *in situ* capable of earning a profit, and that the arbitrators could not, in addition, allow compensation for the loss of the right to supply water within the outlying district. There the arbitrator stated that his mode of procedure was to take the cost of the mains, pipes, and fittings, of laying them down, and making good the ground, and to deduct a sum for depreciation. And, while in that case this was held to have been proper, Lord Herschell, L.C., at p. 449, says that it might not be proper in all cases, and instances a case, not unlike the present, where there had been from time to time an expenditure in perfecting the system and bringing in no immediate return. And as applicable to such a condition, he says: "It is obvious that any one who found that whole system complete and ready for working would be prepared to give more for it than the aggregate sums which had been spent in constructing it, inasmuch as he would have it then ready, and as soon as he had paid his money for it he would be in a position almost immediately to begin earning a profit, at all events, much more quickly than if he had occupied a great deal of time in its construction."

In addition to these qualifying remarks, there are also other material differences. What is taken in the present case is the whole system or railway, all ready to use and capable at once of earning, and earning a profit; there only the "mains, pipes, and fittings" in the outlying district were to be acquired, and these could only be made available by being afterwards connected with some other system of supply. There what was to be paid was the "price" of these definite articles, neither more nor less; here the corporation could only assume the ownership of the railway on paying the "value" thereof. "Value" and "price" may occasionally mean the same thing, but not necessarily so. These considerations lead me, with deference, to the conclusion that, whatever may be the proper result of this appeal, the authority

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upon which Britton, J., so much relied is not in the way of reconsidering the award.

In the English Tramways Act, 1870, the corresponding provision is expressed as "the then value (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district." And a similar provision is contained in the London Street Tramways Act, passed at the same session.

Under these Acts there have been two decisions in the House of Lords, namely, *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, and *London Street Tramways Co. v. London County Council*, in the same volume, at p. 489, which, while the language of the statutes there in question is still not identical with that of our statute, seem to me to be more in point than the case relied on by Britton, J. The "then" value is not different, I think, from the "value," which must refer to the period at which the railway is assumed by the municipality. And the term "tramway" may well be regarded as the equivalent of "railway" in our Act. The main difference is in the use of the words contained in the parenthesis. The decision was, Lord Ashbourne dissenting, that the word "tramway" meant the structure laid down and nothing more, and did not include the statutory powers conferred on the company; that the arbitrator was right in rejecting all evidence of past and future profits, and in awarding that the "then value" of the tramway and all lands, buildings, works, etc., must be measured by what it would cost to establish a tramway if it did not exist, subject to a proper deduction in respect of depreciation.

But it is impossible to read the judgments without seeing that much stress was laid upon the words in parenthesis, and that if they had not been there, the judgment of the Divisional Court setting aside the award and remitting the matter to the arbitrator might not have been disturbed. The opinion of the Divisional Court, in very carefully considered and, to my mind, well-reasoned judgments, was that, notwithstanding the parenthetical words, the "value" was to be ascertained upon a profit-producing basis,

and not merely upon the actual value of the material *in situ*. No two statutes, much less two conditions of fact, are usually identical, and all the circumstances must in each case be considered in order to arrive at what the Legislature intended.

Not much guidance is contained in the bald word "value" used in the section which I have set out, and yet there is always this, that justice, not confiscation, is to be presumed in such a case. Under the provisions of secs. 42, 43, 44, 45, the municipality may operate the railway, or may transfer it to a new or other company. And, of course, the municipality might have granted the franchise for a second term of twenty years to the present company upon terms to be agreed upon.

The statute plainly contemplates the continuous operation of the railway by one mode or the other, with periodical renewals of the franchise, when new terms may be agreed upon, or the railway may be taken over by the municipality. What, then, is the "value" intended by the statute? The question is certainly not without its difficulties. The English decisions, depending on statutory provisions not identical, while they help, do not determine the question. There are, it appears to me, but the two courses: one, to value the material of the railway, including, of course, its lands; the other, to take its net permanent revenue and capitalize that, the result representing its real value. If a railway was being operated at a loss or without profit, the first would be apparently the proper course, because it would have no value beyond the value of its parts, but if it does produce, as this railway does, a very considerable profit, and if it appears that such profit has the quality of permanency, then the other method appears to me to be the only one which could do justice to both parties. The company gets the fruit of its enterprise and its long years of waiting, and the municipality gets the railway, and at once receives the profits—in other words, it gets value as well as gives. It was not, I am sure, intended that the municipality should gain, at the end of the twenty years, at the expense of the company. The municipality parted with the franchise for nothing for the first period of twenty years, and, taking one year with another, it was really worth nothing during that period. Now it has become valuable because of the enterprise and success of the company. But each has had, or is entitled to have, simply

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what was bargained for. So that no question of franchise, either in Berlin or in Waterloo, during that period has, in my opinion, anything to do with the valuation, either by way of increase or deduction. If a new bargain was being made, as might, but for the action of the municipality, have been the case, a price could have been put upon the franchise for the next period, but, on the other hand, if agreed to, the company would in that case receive the benefit of all future increases in profits, and the one would probably balance the other.

The net annual sum which is to be capitalized should, of course, be arrived at with care. It is not necessarily the net income of the last year, although the "value" is to be that at the end of the twenty years. Everything abnormal should be eliminated. With this view the previous years—as many of them as may be necessary—should be carefully examined to see that any gain is likely to be permanent. It should, of course, also be ascertained that the plant is in such condition that, by a normal expenditure upon repairs and replacements, the net annual profit for the year selected for capitalization may reasonably be expected to be capable of being maintained, and due allowance made if the reverse is found to be the fact.

All these elements at least, and perhaps others, enter into the question of what is the real net annual value of the railway, but when that is ascertained, the rest seems to be mere matter of calculation.

I think the award should be set aside and the matter remitted to the arbitrators for reconsideration, and that the costs of the appeal should be paid by the respondents.

OSLER and MACLAREN, JJ.A., concurred in the judgment of GARROW, J.A.

Moss, C.J.O.:—Appeal by the railway company from a judgment of Britton, J., affirming an award of arbitrators appointed to determine the value of the railway owned by the Berlin and Waterloo Street R.W. Co. and of all the real and personal property in connection with the working thereof.

The arbitrators, by their award, found the actual present value of the railway and the real and personal property in connection with the working thereof to be the sum of \$75,200. They

stated in their award that, in arriving at the above value, they valued the railway as being a railway in use and capable of being used and operated as a street railway, and did not allow anything for the value of any privilege or franchise whatsoever either in the town of Berlin or in the town of Waterloo.

They also stated that it was contended before them, on behalf of the street railway company, that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount, so as to reach the correct value of the railway and the real and personal property in connection therewith, but they had not assented to that contention, and had not reached their valuation in any way on that basis, but had considered only the actual present value.

They further stated that it was contended, on behalf of the street railway company, that if their valuation was on actual present value, they should add to the amount found by them as such present value ten per cent. as for compulsory taking, but they had not acceded to this contention.

Upon motion on behalf of the street railway company, by way of appeal from or to set aside the award, Britton, J., upheld it, and determined that, in ascertaining the value, the arbitrators proceeded upon proper principles. Pending an appeal to this Court, an Act was passed by the Legislature and assented to on the 20th April, 1907 (7 Edw. VII. ch. 58), by which it was enacted, amongst other things, that the agreement of reference and the award were ratified and confirmed, subject to such variation in the amount of the award as might be made on appeal.

The preamble of the Act and the schedules thereto set forth or refer to the steps by which the parties arrived at the point of an arbitration and the award in question, and it is not necessary to repeat them here.

The Act also contains provisions wholly incompatible with the notion that the railway company is now, or was at the time of the arbitration and award entitled, to a continuance of the privilege of working its railway in either of the towns of Berlin or Waterloo for a further period of five years from the expiration of the periods of twenty years granted by these municipalities.

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The Act must be regarded as having put an end to the right—if it ever existed in this case—allowed, under certain circumstances, to street railway companies by sub-sec. (2) of sec. 41 of the Act respecting Street Railways, R.S.O. 1897, ch. 208. Having regard to the special Act, the matter must be treated as one arising under sec. 41 (1) of the R.S.O. ch. 208.

The only question, therefore, that is now open on appeal is whether the principles which the arbitrators adopted in ascertaining the value of the railway and the real and personal property in connection with the working thereof were those proper to be applied. There are a few subsidiary questions, but they do not affect the main question, though their determination affects to some extent the amount of the award.

Section 41 of the revised statute provides that “. . . the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration.” And that is the situation in this case. The prescribed notice was duly given, the parties proceeded to an arbitration, an award was made, and the special Act has authorized the town of Berlin, upon payment of the amount of the award, to take over and enter into possession of the street railway and all property and effects thereof (with certain trifling exceptions), as set out in the award.

The basis upon which the arbitration proceeded—indeed, it was the only basis on which it could proceed—was that the privileges of the street railway company of working its railway within the two municipalities terminated upon the expiry of the twenty years during which the privileges existed under the respective agreements with the municipalities, and that the town of Berlin was entitled to assume the ownership of the railway and the real and personal property connected with the working thereof, shorn of all privileges rendering it a going concern in the hands of the railway company.

This fundamental fact has a most important bearing on the question of value and largely governs the method of its ascertainment.

To a great extent, it disposes of the contention that, in ascer-

taining the value, allowance should be made for past or future profits or that the element of profits should be taken into consideration.

It is also important to bear in mind that, so far as the evidence discloses, the town of Berlin is not assuming the ownership of the railway as a commercial venture, with a view to letting or selling it to a company to operate, but in order to carry it on as a municipal undertaking, and that the powers of the town to so carry it on are not derived from the railway company, but from the Municipal Act, the present enactment being sec. 569 (2) *et seq.* of the Act of 1903. So that, when the town assumes the ownership of the railway, the railway company gives nothing in the way of powers or rights of maintaining or operating the railway in or upon the streets of the town.

It follows that the railway company, not having any rights of the character above mentioned of which they can dispose, are not to be treated as giving up to the town a going concern, in the sense that it is one capable of earning profits in the company's hands. That of which the town assumes the ownership, and which the railway company are able to give to it, appears to be aptly described by the arbitrators in their award as a railway in use, and capable of being used and operated, as a street railway, but without any privilege or franchise enabling them to operate it either in the town of Berlin or the town of Waterloo.

The compensation is to be assessed with reference to the value of the railway company's interest, and not with reference to the value to the town: *Stebbing v. Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37.

It is said that to value the railway and the real and personal property in connection with the working thereof on this basis works a great hardship on the railway company and its shareholders, who by expending and risking their capital have established a profit-earning concern.

But if that is the effect of the legislation, it must be accepted, and it may be said of the railway company, as it was said by Lord Adam of the "promoters" in the case of *Edinburgh Street Tramways Co. v. Magistrates of Edinburgh* (1894), 21 Court Sess. Cas., 4th series (Rettie), 688, at p. 698, that "they knew when they entered on their undertaking that it was in the power of the de-

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fenders, the local authority, to terminate by notice their exclusive use at the end of the time. . . . The local authority were themselves the owners of the streets on which the tramway lines lay, and I can quite understand that the Legislature considered that when they became owners of the tramways they should not be called upon to pay for the right of using the streets, which were their own property, in this particular way, for the benefit of the inhabitants, and that it was sufficient that the pursuers should be paid for the material subjects which had cost them money, but that they should not be paid for these powers which had cost them nothing."

The decisions under the English Tramways Act, 1870, and the London Tramways Act must, of course, be considered with reference to the language used by Parliament, but an examination of the speeches of the Law Lords who formed the majority in the cases of *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh* and *London Street Tramways Co. v. London County Council*, [1894] A.C. 456 and 489, tends to shew that the decisions turned not so much upon the significance of the parenthetical words in sec. 43 of the Tramways Act, 1870, as upon the fact that the value of the thing purchased and sold was not of the "undertaking," which was not defined in the Act, but of the tramway and all lands, buildings, works, materials, and plant, etc., and that such value was to be ascertained in view of the further fact that the property was devoid of any privilege or franchise enabling it to be further operated by the tramway companies. Lord Herschell, L.C., said (p. 465): "It was contended for the appellants that the presence of the parenthesis indicated that, in the opinion of the Legislature the term 'value of the tramway' would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution, to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure."

There were difficulties in the construction of the Tramways Act, 1870, owing to the use of language which does not occur

in R.S.O.1897, ch. 208. Here the town is to assume the ownership of the railway, etc., on payment of the value thereof. And the conditions under which it is held are the same in effect as those under which the tramways were held in the cases cited.

The principles which the arbitrators adopted in this case seem to be the proper ones under the circumstances.

Objection was further made that the arbitrators made no allowance for services in supervising the construction of the railway nor for interest on moneys invested during the construction and pending the completion of the undertaking. From affidavits made by two of the arbitrators and a certificate from the other member of the board produced since the argument it appears that these items were considered and an allowance made in respect of them, but not of the full amount claimed by the railway company.

The arbitrators were the best judges of the fairness and adequacy of the allowances made, and there is no good ground for interfering with their conclusion.

Objection was also made to the refusal of the arbitrators to allow 10 per cent. of the value of the railway, etc., as found by them, as for compulsory taking.

In Boyle and Waghorn's Law and Practice of Compensation, speaking of the right of an owner to full compensation in the case of compulsory taking, it is said (p. 424): "He is also entitled by custom to ten per cent. for compulsory sale, which should be added to the value of the premises taken, but not to any compensation due to him for injury to his trade." No cases are referred to, but it seems to be beyond doubt that the allowance is recognized. Indeed, the reference in the parenthesis in sec. 43 of the Tramways Act, 1870, to any allowance as compensation for compulsory sale bespeaks the prevalence of the custom in the case of a compulsory taking. And it has not been considered unreasonable to make an allowance of the same nature in this Province in cases where there has been compulsory taking of lands in the exercise by municipal corporations, railway companies, and other corporations of powers of expropriation.

But the rule or custom is only applicable to cases of that character. The allowance may be treated as in the nature of a *solatium* to an owner who is deprived against his will of the

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proprietorship of his land and of the right to hold and enjoy it at his pleasure and to sell or not, as he sees fit.

But the present case is not one of that character. It is in the nature of a bargain, with a price to be ascertained in a certain defined manner. It is equivalent to an agreement to sell at a price to be fixed, and in that sense does not involve the elements of a compulsory taking.

The appeal should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

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CHEW V. TRADERS BANK OF CANADA.

*Lien—Advances by Bank to Lumbermen—Insurance of Lumber against Fire—
Loss Payable to Bank—Destruction of Lumber by Fire—Lien of Sawyer—
Possessory Lien Terminated by Fire.*

The defendant bank advanced to C. & Co., lumbermen, money wherewith to carry on lumbering operations. With the bank's knowledge, the plaintiff contracted with C. & Co. to saw their logs into lumber, which he did. C. & Co. then insured this lumber, making the loss payable to the bank; and, while lying in the plaintiff's yard, the lumber was burnt. The plaintiff claimed to be entitled to payment, out of the insurance moneys, in priority to the bank, of the contract price of the sawing:—

Held, that the plaintiff had, at most, a mere possessory lien upon the lumber, for the price of the sawing, depending not upon contract, but wholly upon possession, and therefore brought to an end by the fire; while the bank had a lien upon the insurance moneys, which the plaintiff was not in a position to attack or displace.

Judgment of RIDDELL, J., reversed.

THIS was an appeal by the defendants the Traders Bank of Canada from the judgment of RIDDELL, J., at the trial of this action. The circumstances of the case are fully set out in the judgments.

The action was tried before RIDDELL, J., at the non-jury sittings in Toronto, on February 15th, 1909.

J. Bicknell, K.C., and *A. Bicknell*, for the plaintiff.

E. F. B. Johnston, K.C., for the defendants the Traders Bank of Canada.

G. Grant, for the defendants *S. Caswell & Co.*

February 17. RIDDELL, J.:—Caswell & Co., lumbermen, were customers of the Traders Bank. They took out a timber license in the name of the bank, the bank advancing them the money to carry on their timbering operations. The lumbermen took out a considerable amount of rather inferior small logs, and, with the knowledge of the bank, the plaintiff proceeded, under contract with Caswell & Co., to saw these logs into lumber. The bank did not till afterwards know the exact terms of the contract of sawing, but knew that the sawing was being done by the plaintiff. The sawing was not paid for. The logs being converted into lumber, the lumber lay in the yard of the plaintiff until July 1st, 1908, when it was burned. The bank did not know, as a fact, that the sawing was not being paid for, simply because the matter never was considered. Had the matter ever come up or occurred to the bank manager, he would have known that this was the case, and he had at all times the means of knowledge if he cared to make use of them.

Insurance policies had been taken out upon this lumber by Caswell & Co., and, as the bank were still largely the creditors of the lumbermen, the "loss" was made payable to the bank. The insurance was "on sawn lumber, owned by the assured or held in trust or on commission, or sold but not now delivered, now piled or that during the continuance of this insurance may be piled in Chew's yard, situate at Sturgeon Bay, formerly known as Tanner Bros.' yard."

When the fire took place, the lumber was all in the plaintiff's yard, and the plaintiff claimed out of the insurance money an amount equal to the contract price of the sawing. This the bank disputed; and the present action followed.

The insurance companies have paid the money into Court; and other proceedings have taken place unnecessary to refer to.

The defendants Caswell & Co. set up that the sawing was not well done, and that some of the logs were lost through the negligence of the plaintiff. Both these claims I find against on the evidence. A reduction of \$300 should be made in the plaintiff's claim, because he did not load; the claim of Caswell & Co. for material admittedly converted by the plaintiff, the parties have in a businesslike and common-sense way adjusted by setting off

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another small claim the plaintiff has against them. The plaintiff's claim for sawing as so reduced by \$300 must be allowed.

Then, as regards the right as against the bank. That a lien existed in favour of the plaintiff is clear, and, indeed, is not disputed; but it is contended by the bank that the destruction of the goods destroyed the lien, and that the bank may, consequently, hold the whole amount of the insurance money as against the plaintiff. For this proposition is cited the case of *United States v. Barney* (1878), 19 Am. & Eng. Encyc. of Law, 2nd ed., p. 34. In the text the case is cited only for the proposition that the lien expires when the property upon which it exists is destroyed. That, of course, must be so; no lien can attach if there be no property upon which it can attach. But the case being looked at, 3 Hughes (U.S.) 545, it is said, incidentally, "it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud," citing *Chapman v. Derby* (1689), 2 Vern. 117, and *Ex p. Shank* (1754), 1 Atk. 234. The decision, however, is only that a claim of lien cannot be enforced to stop the passage of the United States' mail in a stage coach drawn by the horses upon which the lien is claimed. And I can find no authority suggesting that the rule contended for exists in law.

On principle, I do not think that the position of the bank can be maintained.

The insurance was upon the lumber, and covered the interests of all who had an insurable interest, at the least. That a lienor has such an interest is undoubted: *Joyce on Insurance*, secs. 1001, 1002.

Had the insurance money been payable directly to the lumbermen, I think it not doubtful that they would have had it in their "hands bound by a trust in favour of the" plaintiff "to the extent of" his "interest in the subject matter of the insurance:" *Imperial Bank of Canada v. Hinnegan* (1905), 5 O.W.R. 247, at p. 249. And I am unable to see that the circumstance that the money is made payable to the bank makes any difference.

The case of *Johnson v. Campbell* (1876), 120 Mass. 449, is in some respects not unlike the present. There a consignee, who had made advances upon goods consigned to him, had effected an insurance for the benefit of the consignor; a fire took place,

and the question arose as to whether the same lien existed upon the insurance money as upon the goods, and it was held that "when the goods were destroyed by fire, the amount recovered upon their loss was substituted in their place, and was held subject to the same lien." It is true that the insurance in this case was in the name of the factor himself, but the principle is not affected.

As to the position of third parties in the case of a lien, *Hudson v. Granger* (1821), 5 B. & Ald. 27, may be looked at.

It would be an unfortunate result if the bank were to be allowed, by reason of a fire, to take the benefit of the plaintiff's work without paying for it; and I am glad that the law, as I read it, does not compel me to give the bank that advantage.

The pleadings will be amended by inserting the plaintiff's right name, and by adding in the reply a claim of the plaintiff against Caswell & Co. on an open account; then judgment will go setting off the claim so added against the claim for logs and lumber set out in the 6th paragraph of the pleading of Caswell & Co., and in other respects dismissing the counterclaim with costs, declaring that the plaintiff is entitled as against the defendants Caswell & Co. to the sum of \$5,962.30 and interest from the teste of the writ and costs of action, claim and counterclaim. As against the bank the plaintiff is entitled to a declaration that he has a lien to the said amount upon the insurance money, to an order that the same be paid to him out of the money in Court, and that the bank shall pay the costs of the action, not including the costs of the counterclaim.

Were the proper conclusion that the statute the Crown Timber Act, R.S.O. 1897, ch. 32, sec. 3 *et seq.*, being given its full literal effect, the logs were the property of the bank, the conclusion would follow that the contract for sawing made by Caswell & Co. should be held as so made as agents of the bank, and that the bank should be held personally liable for the amount of the claim; but I am unable to hold that, as between all the parties to this action, the logs were not the property of Caswell & Co.

The appeal was argued on April 29th, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

E. F. B. Johnston, K.C., and *G. Grant*, for the appellants,

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the Traders Bank of Canada, contended that the bank had nothing to do with the claim for sawing the lumber; that the plaintiff's lien lasted as long as he had possession, but that, his possession ceasing when the logs were burnt, his lien also ceased, and he could claim no lien on the insurance money, and that, insurance not being property, the lien on the logs could not be transferred to it: *Scarfe v. Morgan* (1838), 4 M. & W. 270, at p. 283; *Campbell's Ruling Cases*, vol. 16, at pp. 93, 94; *In re Leith's Estate, Chambers v. Davidson* (1866), L.R. 1 P.C. 296, 305; *Cowell v. Simpson* (1809), 16 Ves. 275.

J. Bicknell, K.C., and *G. B. Strathy*, for the plaintiff, contended that the insurance premiums were paid by Caswell & Co.'s money and not by the bank's; that at the time the insurance was effected, the bank knew that the logs had to be cut; that the intent of the policy was that the insurance should cover everybody's interest; and that Caswell & Co., in making the contract to have the lumber cut, acted on behalf of the bank. They referred to the Crown Timber Act, R.S.O. 1897, ch. 32, sec. 3, sub-sec. 2; the Act respecting Mortgages of Real Estate, R.S.O. 1897, ch. 121, sec. 1, sub-secs. 1 and 4; the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, sec. 51; *Everitt v. Automatic Weighing Machine Co.*, [1892] 3 Ch. 506.

Johnston, K.C., in reply, cited *In re Leslie, Leslie v. French* (1883), 23 Ch. D. 552, 562; and R.S.O. 1897, ch. 32, sec. 2.

June 30. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendants the Traders Bank of Canada from the judgment at the trial before Riddell, J., in favour of the plaintiff.

The plaintiff's claim, as put in the statement of claim, has two aspects—one that the appellants are liable upon a contract made on their account by their agents, Caswell & Co., for the sawing of the lumber in question; the other that the plaintiff has a lien on the lumber for the price of sawing, which he is entitled to enforce against the insurance moneys paid into Court in satisfaction of claims under the policies of insurance upon the loss of the lumber by fire, which insurance moneys are claimed by the defendants the Traders Bank of Canada under the circumstances which hereafter appear.

The agreement under which the sawing took place is in writing. It was made between the plaintiff, a saw miller, and Caswell & Co., lumbermen, the owners of the logs. The defendants the Traders Bank of Canada are not mentioned in it, nor was there any evidence that it was made for them or for their account; so that the first branch of the case was properly held by Riddell, J., not to have been established.

As to the other branch, Riddell, J., held that the plaintiff was entitled to the lien claimed, and from this result the present appeal was taken.

In his judgment Riddell, J., says: "On principle, I do not think that the position of the bank can be maintained. The insurance was upon the lumber, and covered the interests of all who had an insurable interest, at the least. That a lienor has such an interest is undoubted: Joyce on Insurance, secs. 1001, 1002. Had the insurance money been payable directly to the lumbermen, I think it not doubtful that they would have had it in their 'hands bound by a trust in favour of the' plaintiff 'to the extent of' his 'interest in the subject matter of the insurance:' *Imperial Bank of Canada v. Hinnegan*, 5 O.W.R. 247, at p. 249. And I am unable to see that the circumstance that the money is made payable to the bank makes any difference."

I am, with deference, quite unable to agree with this conclusion. I even doubt whether upon the facts the plaintiff could have successfully asserted a right to a lien upon the insurance money if the bank had been out of the question altogether. What the plaintiff, at the most, had was a mere possessory lien for the price of the sawing, depending not upon contract, but wholly upon possession, and therefore brought to an end by the fire. While it lasted, the plaintiff was to that extent a favoured creditor, but with it gone he was remitted to the position of any other ordinary unsecured creditor. What he now asserts is in the nature of an equitable lien. Such a lien, which is not dependent upon possession, is necessarily based upon evidence of a trust created or arising under a contract, express or implied. It is not enough to say, as in effect was said, that now that the lumber is burnt, the insurance money represents it, and because it represents the lumber and because the plaintiff had an insurable interest in respect of his lien, therefore he has the same lien on the insurance money that he had on the lumber.

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In the case referred to of *Imperial Bank of Canada v. Hinnegan*, 5 O.W.R. 247, the learned Chief Justice says, at p. 248: "The agreement of Raymond to insure for the benefit of defendants was also, I think, proved;"—a very material finding, without which the result in that case would clearly not have been arrived at. There is here no evidence of any contract, express or implied, between the plaintiff and Caswell & Co. upon the subject of insurance, nor anything to shew that the subject was ever even mentioned between them prior to the fire. Nor is there evidence to support the finding that the insurances were intended to cover the interest of all parties concerned, including the plaintiff. The history of the insurances is simple, and not in any way in dispute. The defendants the bank were making large advances to Caswell & Co., to enable the lumbering operations to be carried on. Caswell & Co., at the request of the local agent of the defendants' bank at Orillia, agreed to insure to secure the defendants in respect of such advances. The agent applied for and obtained the policies in the name of Caswell & Co. as the assured, paying the premiums, and charging them to Caswell & Co. The property insured was described in the policies as "on sawn lumber, owned by the assured or held in trust or on commission, or sold but not now delivered, now piled or that during the continuance of this insurance may be piled in Chew's yard, formerly known as Tanner Bros.' yard, situate at Harpon Bay, Ontario. Loss (if any) payable to the Traders Bank of Canada."

The effect of these words, "Loss (if any) payable to the Traders Bank of Canada," was to give to these defendants a lien on the policies and their proceeds: see *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262. And this lien has not been in any way that I can see successfully attacked by the plaintiff, and certainly not displaced in favour of the plaintiff, whose attempt to establish a lien of any kind, in my opinion, entirely fails.

Counsel for the plaintiff raised a question as to the defendants' position under the Bank Act in respect of the advances, which, it is said, were made before the security was taken. The question was not raised in the pleadings nor apparently at the trial, for no reference is made to it in the judgment; and it ought not to be now entertained. Another question also raised and discussed by counsel was that the plaintiff had acquired a lien under sec. 51

of the Mechanics' Lien Act, which, by virtue of sec. 4 of the Act respecting Mortgages of Real Estate, had, by the fire, been converted into a claim upon the insurance money. What force such a contention might have as between the plaintiff and his own debtor it is not necessary to discuss, but, as against the defendants the bank, who claim under the express terms of the policies, it can have none.

For these reasons, I am of the opinion that the appeal should be allowed with costs.

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McKIM v. BIXEL.

Partnership—Syndicate—Right to Share Percentage of Profits—Non-Liability as Partners.

A syndicate of men registered as a partnership to acquire, develop, and operate mines, and advertised that "special memberships" in the syndicate might be obtained for a certain price, and that such special members would become entitled to a 40 per cent. interest in the syndicate. The defendants applied for admission as special members on December 6th, 1906, paying the prescribed amount, and the applications were acknowledged and certificates sent them on February 14th, 1907, but not before. These certificates declared them entitled to share ratably with other special members in 40 per cent. of the net profits made by the syndicate:—

Held, that the defendants did not thereby become members of the partnership, and therefore were not liable for a debt contracted thereby. Judgment of RIDDELL, J., affirmed.

ACTION tried before RIDDELL, J., at the non-jury sittings at Toronto, on March 23rd, 1909. The facts are stated in the judgments.

C. P. Smith, for the plaintiffs.

W. E. Middleton, K.C., and *J. Baird*, K.C., for the defendant Bixel.

E. C. S. Huycke, K.C., and *W. T. J. Lee*, for the defendant Harcastle.

March 26. RIDDELL, J.:—On November 27th, 1906, a declaration of co-partnership was registered in the registry office for East Toronto, signed by George Cass Campbell, of New York, manager; Albert Ferdinand Dexter, of Chicago, miner; and Charles W. White,

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of New York, "Esq." The partnership was for the acquisition, development, and operation of mines, mining locations and all business incidental thereto, the promotion and incorporation of other syndicates or joint stock companies in connection therewith, and the acquisition and purchase of stocks, bonds, or other securities in connection with the purpose or objects aforesaid, and under the name and firm of the Cobalt Nipigon Syndicate.

They advertised extensively. One advertisement in its material parts read thus:—

"Cobalt.

"The Cobalt Nipigon Syndicate (registered).

"The above syndicate has been formed to buy, develop, locate, and exploit properties in the Cobalt region and elsewhere in Canada. It already owns over 700 acres of patented mining lands. Special memberships in this syndicate are \$120 each, or \$10 per month for 12 months. Those who become full paid members by December 5th will share immediately in the distribution of 40 per cent. of the stock in the Nipigon Mines Company Limited, which is just being incorporated.

"Title to all mineral lands is, and will be vested in the Trusts and Guarantee Company Limited . . . in trust to dispose, *pro rata*, the above stock among special full paid members under the direction of the syndicate.

"Fill in appended application for membership and mail to the Trusts and Guarantee Company Limited, Toronto, Canada, who will send you receipts for each payment, or, if paid in full, a non-assessable membership certificate.

"All applications must be accompanied by draft payable to our order.

"Geo. C. Campbell,

"Syndicate Manager."

"To the Trusts and Guarantee Company Limited, register and transfer agents, Toronto, Canada.

"I hereby apply for . . . memberships in the Cobalt Nipigon Syndicate, and enclose draft for \$. payable to the syndicate.

"Name"

"Address"

In an adjoining column the incorporation of the Nipigon Mines Company Limited was advertised, and it was said:—

“No stock will be offered for public subscription . . .

“To share in the above corporation, applications for fully paid special memberships in the Cobalt Nipigon Syndicate must be accompanied by payment in full (certified cheque or draft) and mailed to the Trusts and Guarantee Company Limited, Toronto, Canada, register and transfer agents, on or before December 5th, 1906. Cheques or drafts to be payable to the syndicate.”

It is written: “Surely in vain the net is spread in the sight of any bird:” but this does not extend to men. Two persons at least, these defendants, were found to apply for “membership,” the defendant Bixel from Brantford and the defendant Hardcastle from Hamilton township. Their applications upon the blank form of the advertisement and accompanied with a draft or cheque for the full amount, \$120, were received by the Trusts and Guarantee Co. on December 6th, 1906. The receipt of these applications was not acknowledged.

On February 14th, 1907, the Trusts and Guarantee Co. counter-signed and registered, and then sent to each of the defendants, a membership certificate. That sent to Bixel read as follows:—

“No. 1116.

Special Membership No. 1.

“The Cobalt Nipigon Syndicate (registered).

“This certifies that O. Bixel is the holder of one fully paid and non-assessable special memberships (*sic*) of the Cobalt Nipigon Syndicate (registered) transferable only on the books of the syndicate by the holder thereof in person or by attorney upon surrender of this certificate. This certificate shall not become valid until counter-signed by the Trusts and Guarantee Company Limited, transfer agent and registrar of transfers.

“This certificate of special membership entitles the holder hereof to share *pro ratâ* with other special memberships 40 per cent. of the net proceeds or profits from sales or other disposition

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of the properties of the syndicate under the direction of the syndicate.

"February 14th, 1907.

"Countersigned and registered.

"The Trusts and Guarantee Co. Limited,

"Toronto, Canada. The Cobalt-Nipigon Syndicate.

"H.W..... per G. C. Campbell,

"Transfer Agent and Registrar. Syndicate Manager."

Mr. Hardcastle's certificate was numbered 1119, but he had, along with Mr. Bixel, the proud distinction of having his certificate "special membership No. 1."

With a large red seal in the corner and the word "preference" printed in large red letters across the face of the certificate, the certificate looks truly imposing and captivating.

The agreement between Campbell, Dexter, and White, forming the syndicate, had provided that they should be entitled to 60 per cent. of the assets of the syndicate, and the holders of memberships to 40 per cent.: "(11) Applicants for memberships may be of two classes, namely, cash memberships and instalment memberships. Applicants for cash memberships shall be liable to pay to the syndicate the full amount of the purchase price of their membership upon the acceptance of their application . ." And sec. (15) provides for a certificate in the form already set out. Section (29): "No person shall be entitled to a membership in the syndicate unless he receives a certificate thereof signed by the manager and countersigned by the registrar."

On December 14th, 1906, after receipt of the two applications, but before the issue of the certificates, the syndicate, through Campbell, the manager, entered into a contract with the plaintiffs for advertising. The syndicate did not pay: whereupon the plaintiffs sued the syndicate and Campbell, and on December 21st, 1907, recovered judgment against both defendants in that action for \$2,868.14. No part of this has been paid, and now the plaintiffs in that action sue the two applicants, Bixel and Hardcastle, for the amount, having, it would seem, discovered that they had sent in their applications and their money before the date of the contract for advertising. the subject matter of the previous action.

The case was very fully and learnedly argued by counsel for all parties; in the view I take, it is not necessary to consider the many and somewhat intricate points argued.

It is beyond question that, unless in exceptional classes of cases, of which the present is not an example, "an incoming partner can neither sue nor be sued in respect of a liability of the old firm, unless there is some agreement express or implied between himself and the person suing him or being sued by him:" Lindley on Partnership, 6th ed., p. 295. Nothing of the kind appears here. The application for membership—assuming that membership of this peculiar kind can constitute a partnership—does not at once, even accompanied by the purchase price, constitute the applicant a partner. He must according to the syndicate contract get a certificate—or, at the very least, he must have his application accepted. The only acceptance is in the form of a certificate which does not become effective until February 14th, 1907. It cannot, I think, be held that the defendants were in fact members until that day. And there is nothing incongruous in the applicants being entitled to a share in the new company's stock upon sending in application and money by a fixed day and being benefited as though they were members from that day, but still not becoming members till a subsequent day. They are, therefore, not liable in this action.

Moreover, as at present advised, I do not think that membership in the peculiar manner of this membership renders the member liable as a partner. No doubt, Mr. Campbell would have been much startled to be informed that Bixel or Hardcastle could make the syndicate liable for anything.

The action should be dismissed. I am sorely tempted to refuse the defendants their costs, but, on a careful consideration of all the facts, I do not think I should do so. They are not to blame for this action being brought, and should not suffer more than they have already done for their lack of foresight.

The plaintiffs appealed from this judgment, and their appeal was argued on May 12th, 1909, before a Divisional Court composed of BOYD, C., MACMAHON and TEETZEL, JJ.

C. P. Smith, for the plaintiffs, contended that the association in question here was a partnership only, and was never intended to be made into a company, and that, as partners, the defendants

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were liable, and referred to *The King v. Dodd* (1808), 9 East 516, at p. 527; *Walburn v. Ingilby* (1832), 1 My. & K. 61; *Pooley v. Driver* (1876), 5 Ch. D. 458; Lindley on Partnership, 7th ed., pp. 20, 99; Pollock on Contracts, 6th ed., p. 663, note b.

W. E. Middleton, K.C., and *K. F. MacKenzie*, for the defendant Bixel, contended that no partnership was constituted here, and that, if there was, the debt in question was incurred before the defendants became partners; that there was no agreement to share profits and losses, but the defendants were to have 40 per cent. of the profits; that there was nothing more than a mere application here; and that the parties would not become partners until admitted as such. He referred to *Merchants Bank v. Thompson* (1882), 3 O.R. 541, 565; *Fox v. Clifton* (1830), 4 Moo. & P. 676; *Davis v. Davis*, [1894] 1 Ch. 393; *Badeley v. Consolidated Bank* (1888), 38 Ch.D. 238; *Mendelssohn Piano Co. v. Graham and West* (1890), 19 O.R. 83, 17 A.R. 378; *Walker v. Hirsch* (1884), 27 Ch.D. 460; *Mollwo, March, & Co. v. The Court of Wards* (1872), L.R. 4 P.C. 419; *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285; *Moore v. Davis* (1879), 11 Ch.D. 261; *Worthington v. Macdonald* (1884), 9 S.C.R. 327; Lindley on Partnership, 5th ed., p. 2; Pollock on Partnership, 8th ed., p. 29.

E. S. C. Huycke, K.C., for the defendant Harcastle, referred to English Ruling Cases, vol. 19, p. 323; *Mayo v. Moritz* (1890), 151 Mass. 481, at pp. 484-5; *Morel Brothers & Co. v. Earl of Westmorland*, [1904] A.C. 11; *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Ray v. Isbister* (1895), 22 A.R. 12; *Campbell v. Farley* (1898), 18 P.R. 97; *Adam v. Newbigging* (1888), 13 App. Cas. 308.

May 15. BOYD, C.:—"The Cobalt Nipigon Syndicate" is the name of a registered partnership, consisting of Campbell, Dexter, and White, as the only members on November 26th, 1906. The business of the partnership was to acquire, develop, and operate mines, and the plaintiffs' contention is that the defendants have become members of that partnership, and are liable for its debts.

The syndicate advertised that special memberships might be obtained in the syndicate, on payment of \$120, payable to the order of the syndicate, and sent to its register and transfer agents, the Trusts and Guarantee Company. The defendants sent applications, according to the form given in the advertisement, to

the Trusts and Guarantee Company on December 6th, 1906, which were not acknowledged by the company till February 14th, 1907, when certificates were sent to the effect that the defendants were holders of fully paid non-assessable special memberships of the syndicate. The certificate entitled the holder to share *pro ratâ* with other special memberships 40 per cent. of the net proceeds or profits from sales, etc., of the syndicate properties.

The argument briefly is, that the certificate retroacts to the date of the application, or that, by virtue of the application, accepted as it was, each defendant became a partner in the syndicate as of December 6th. The membership was made transferable upon the books of the company by the holder of the certificate upon surrender thereof.

The status of the defendants does not present any elements of a partnership connection with the registered partners named. What is acquired by the payment is a right to share in 40 per cent. of the net profits accruing to the syndicate in common with all other persons who purchase special memberships. Losses are not contemplated and are not provided for. Control of the operations of the syndicate is not conferred upon the one or the many special memberships; that is limited to the registered syndicate. The defendants are more like shareholders in a company or co-owners than members of a partnership. The assignable quality of the interest possessed is quite alien to the essential idea of partnership, where one cannot of his own volition introduce a new member of the firm. The receipt of an uncertain share of 40 per cent. of possible profits cannot be regarded as the controlling element in this as going to indicate partnership. The whole disposal and management of the mythical property was left with the original syndicate as registered, and they were not acting, or going to act, or intending to act, as agents of the special membership: *Kilshaw v. Jukes* (1863), 3 B. & S. 847, 867.

I see no ground on which to disturb the judgment, and I place my opinion on the fact that there was no partnership *quoad* the defendants. It is not a case for further costs.

MACMAHON and TEETZEL, JJ., concurred

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WELLINGTON V. FRASER.

Sale of Goods—Contract—Warranty—"Good Condition" of Fruit Trees—Counterclaim—Damages—Remedy Given by Contract—Jurisdiction of County Court—Promise of Guarantee by Agent—Waiver—Interest—Costs.

A contract for the sale of fruit trees contained a warranty that the stock should be delivered in "good condition;" but, should it prove untrue to label, and not "equally as good" as the variety ordered, it would be replaced free, or purchase price refunded, etc., which should be in full settlement of all claims; that no outside agreement or bargain by the agent should in any way affect the contract; and that all stock which failed to live was to be replaced at half price at next delivery, provided notice thereof was given by a named date:—

Held, that the words "good condition" were synonymous with "good quality," and the warranty was not therefore confined to the external and apparent condition of the stock, but extended to the health so as to warrant that the stock was such as would live and thrive; and that this was apart from the provision as to their not being up to label, etc., this merely referring to replacing stock not of the kind ordered; nor was the purchaser restricted to the remedy provided by the contract of having stock that failed to live replaced, etc.; for the purchaser's right to bring an action, and hence to counterclaim, did not arise out of the contract at all, but was an independent right given by the law.

Compania Naviera Vasconzanda v. Churchill, [1906] 1 K.B. 237, distinguished. A special warranty alleged to have been given by the plaintiffs' agent was set up by the purchaser; but on the evidence—apart from the express provision as to outside agreements, etc., by the agent—this was held to have been waived by the purchaser.

On a counterclaim for damages in a county court action the defendant is not limited to \$200, but may recover an amount equal to the plaintiff's claim.

Davis v. Flagstaff Silver Mining Co. of Utah (1878), 3 C.P.D. 228, and *Wallace v. People's Life Insurance Co.* (1899), 30 O.R. 438, followed.

Judgment of the county court of York, allowing the seller the price of the stock sold, without interest, and the purchaser \$200 damages on his counterclaim, in both cases without costs, affirmed with costs.

APPEALS from the judgment of the county court of the county of York.

The action was brought to recover \$235.25, the price of a number of fruit trees sold by the plaintiffs to the defendant.

The defendant, besides denying the plaintiffs' claim, counterclaimed for damages for the loss he had sustained by reason, as he alleged, of the trees not being of the quality agreed upon.

The trial took place before Morgan, junior Judge of the county court.

The evidence, so far as material, is set out in the judgment.

The learned county court Judge found in favour of the plaintiffs for the amount of their claim, but without costs or interest, and for the defendant for the sum of \$200 on his counterclaim, but without

costs, being of the opinion that, under the jurisdiction of the county court, he was limited to that amount; the result being a judgment in favour of the plaintiffs for \$53.25 without costs.

From this judgment the plaintiffs and defendant respectively appealed and cross-appealed to the Divisional Court, the plaintiffs contending that they should have been allowed interest at five per cent. from the date of the delivery of the trees, namely, the 21st September, 1908, until judgment, amounting to \$14.70, making the amount for which judgment should have been entered for them \$267.95, and that they should also have been allowed their costs, and that the defendant's counterclaim should have been dismissed with costs; the defendant contending that the plaintiffs' action should have been dismissed with costs, and that in any event the judgment on the counterclaim should have been for the amount of the plaintiffs' claim with costs.

On June 18th, 1909, the appeal was heard before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

E. B. Ryckman, K.C., for the appellants.

E. M. Young, for the respondent.

June 23. RIDDELL, J.:—The plaintiffs are dealers in nursery stock in Toronto, and had an agent Lavis (now dead) in Prince Edward county.

The defendant wanted some nursery stock, and went to Lavis to see if he could get him a quantity from the plaintiffs. Lavis told him that he (the defendant) could not get a "guarantee" from the plaintiffs until they knew what he wanted, saying, "they sell different grades of stock, and they will not give a guarantee until they see what is ordered." A form of order was produced, and some part of it was marked out; but even that did not satisfy the defendant, who said to Lavis "if he would get me a guarantee from the firm I would be satisfied that it would be first-class stock, as I was to pay first-class price. He" (Lavis) "said if I paid first-class price for the stock I would get first-class stock and get a guarantee from the firm . . . He said I couldn't get a guarantee from the firm until I signed this order . . . so I signed this order."

The defendant accordingly signed the order sued upon. It reads as follows:—

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"Stone & Wellington,

"Nurserymen and growers of seed potatoes,

"Toronto, Ont.

"You will please furnish me the following nursery stock for which I am responsible and for which I agree to pay \$253.25 in cash on delivery at North Port during April or May, 1906, anything omitted to be deducted from the bill.

"It is mutually agreed that the stock in this contract is not warranted, further than to be delivered in good condition and should any of it prove to be untrue to label and not equally as good as the variety ordered, such stock shall be replaced free or purchase price refunded with interest thereon, which shall be settlement in full of all claims.

"This order is not subject to countermand, and must be taken according to the printed condition hereon.

"No outside agreement or bargain by the agent shall in any way affect this contract; and the purchaser admits the correctness of the written names of the articles ordered; and further states that there are no other terms or conditions of the order than those named herein. Standard apple and pear trees to be not less than five feet in height; cherry and plum trees not less than four feet; dwarf pear and peach trees not less than three feet. In case specified varieties cannot be furnished, others considered by you as equally desirable may be substituted.

"All stock that fails to live to be replaced at half price at next delivery, provided you are notified by August 1st next. Cash to accompany notice.

(Sgd.) D. H. Fraser."

Then follows a list of stock ordered.

There is produced at the trial what the defendant says was handed him by Lavis as a duplicate; but it seems clear from the defendant's own evidence that this is the order, part of which Lavis erased, but with which the defendant even then was not satisfied. It cannot, then, be contended that this is the contract between the parties—the defendant never assented to it, nor did the plaintiffs—at most, it was an attempt by Lavis to frame a contract which would satisfy the defendant.

The order went forward to the plaintiffs at Toronto, and they shipped to the defendant the goods ordered; and of these the

defendant acknowledged the receipt on the 5th May, 1906: "I have received the nursery stock for my delivery in very good condition." The stock, in fact, as found by the trial Judge, had an inherent defect, and did not, as it could not, produce good trees—cherry trees, etc. With this finding the plaintiffs do not quarrel. The defendant, however, kept the stock, but did not pay for it.

An action was brought in the county court of the county of York, on the 29th September, 1908, and it was tried before His Honour Judge Morgan, in March, 1909.

The trial Judge held that the plaintiffs were entitled to recover the amount sued for, \$253.25.

A counterclaim had been filed for damages, and while His Honour thought the defendant entitled to damages to a much larger sum, he considered that he could not allow more than \$200, that being the limit of the jurisdiction of his court.

Both parties appeal.

In respect of the counterclaim, if the defendant have proved damages in excess of the \$200 allowed, there is no reason why a sum should not in this action be allowed sufficient to counter-balance the plaintiffs' claim.

In *Davis v. Flagstaff Silver Mining Co. of Utah* (1878), 3 C.P.D. 228, Brett, L.J., at p. 237, says: "The inferior Court may deal with the counterclaim, which, if it were an original claim, would be beyond its jurisdiction, to the extent of answering the claim of the plaintiff, but not further."

Cotton, L.J., at p. 239: "The defendant is to use the counterclaim as a shield, but not so as to enable him by means of a judgment to obtain payment of a sum of money beyond the amount of the plaintiff's claim."

Thesiger, L.J., at p. 242: "As soon as a judgment is obtained by the defendant of sufficient amount to overtop or rather equal the claim of the plaintiff, then if the counterclaim is *prima facie* beyond the jurisdiction of the Court, the Court shall hold its hand, and as regards the overplus of the counterclaim, that must be dealt with by some other Court."

So in *Wallace v. People's Life Insurance Co.* (1899), 30 O.R. 438, the plaintiff recovered \$308.55, and the amount found due under the counterclaim was \$1,169.54; the county court Judge of Carleton allowed only \$200, under a belief like that of Judge Morgan.

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The Divisional Court varied this judgment, and held that the defendants were entitled to judgment on the counterclaim to the full amount of the plaintiff's claim.

Neither of these cases, both of which are binding upon him, was brought to the attention of the learned Judge, nor indeed to ours upon the argument.

It will, however, be necessary to consider the rights of the parties.

The defendant knows that the agent Lavis cannot give him the warranty he desires, and signs a contract which excludes all but a very special warranty, apparently relying upon a statement that if he would sign the order, he (the agent) would send it on, and the company, the plaintiffs, would send down a "guarantee." The defendant was agent himself for the plaintiffs for the delivery of their stock, and had considerable correspondence with them, but he never refers to any warranty nor asks for one, although he speaks of many complaints made by others, and himself (30th July, 1906) complains of the trees he has received.

At the trial he says that he opened the stock received by him almost at once and discovered that the stock had no roots sufficient for the trees to live, took them out of the boxes and put them in a trench, being satisfied in his own mind they would not live, but determined to set them out and settle for them if they lived. Quite a number did not even "leaf out," and only seventy-five lived out of three hundred cherry trees, and of these there are now only fifty-eight alive, and even these are not good trees.

The defendant accepted the trees without any warranty such as he says he thought he would get from the plaintiffs—accepted these trees upon the order he sent in—used the trees as his own, and at no time ever asked for the warranty. It seems to me that he cannot now say that the plaintiffs should be bound as though they had given a warranty in the form that their agent promised they would. He must be considered as having waived all rights but those appearing from the contract he actually signed; and that, irrespective of the term in the written contract that "no outside agreement or bargain by the agent shall in any way affect this contract," and providing that "there are no other terms or conditions of the order than those named herein." His rights, then, will depend upon this contract. The learned county court Judge

has given effect to this contract in his judgment, although he seems to think that the defendant might legally claim rights *dehors* the document, based upon the altered document left with him by Lavis.

The express warranty is that the stock shall be delivered in "good condition." Mr. Ryckman argues that this means apparently good order, shewing no visible external signs of bad usage, as distinguished from "good quality," which means in good health and such as should produce trees living and thriving.

In *Compania Naviera Vasconzada v. Churchill*, [1906] 1 K.B. 237, at p. 245, Channell, J., says: "It seems to me that while in reference to some things and to some defects in them 'condition' and 'quality' may mean the same thing, yet that they do not either necessarily or even usually do so. I think that 'condition' refers to external and apparent condition, and 'quality' to something which is usually not apparent, at all events to an unskilled person."

But in that case the learned Judge was speaking of the words in a charter party of certain timber in which charter party appeared the clauses, "shipped in good order and condition, and to be delivered in the like good order and condition," and "quality and measure unknown." Of course there must needs be a distinction between "condition" and "quality" in such a contract, and as the learned Judge says (p. 245): "I think a captain is expected to notice the apparent condition of the goods, though not the quality."

Such a case has no resemblance to the present, in which one desiring to set out a cherry orchard buys from the producers of such stock, young cherry trees with a warranty that they are in good condition. It seems to me absurd that the purchaser should be thought to have been providing for a sound external appearance (as to which he could judge as well as the plaintiffs), and not for the internal quality, of which he could have no means of judging. Nor does the case of *Snelgrove v. Bruce* (1866), 16 C.P. 561, assist the plaintiffs. In that case there was no express warranty.

There is no advantage in going through the cases in which the word "condition" has been interpreted by Courts: see Words and Phrases Judicially Defined, vol. 4, pp. 3124 *et seq.* The English

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Judge has put the matter in a nutshell: "'Condition' and 'quality' may mean the same thing."

In this case I think these words are synonymous, and that "condition" does not refer merely to the "external and apparent condition."

A human being could not be said to be in "good condition," however bright the eye, clear the skin, light the step, and high the spirits, whose outer frame concealed a mass of fatal cancer or tubercle; nor is a horse in "good condition" when he has a sleek and glistening coat and well rounded form, but is in the incubatory stage of glanders or pleuro-pneumonia. An apple tree is not in "good condition" whose bark is clean and whose leaves are fresh, but whose core is rotten to such an extent that it cannot live. And although in a contract concerning dead timber, in which the words "good condition" and "quality" are contradistinguished and used in different connection, "condition" may apply only to something external and visible, the same rule could not be extended to the case of an article which is supposed to be alive and which is worthless if it is not alive. In such articles as these, it is the living state and capacity to grow into living trees which constitute the only value, and this must be the "good condition" warranted.

Notwithstanding the letters of the defendant, this warranty beyond question was broken. What remedy has the defendant? There is a provision that "should any of it prove to be untrue to label and not equally as good as the variety ordered, such stock shall be replaced free or purchase price refunded with interest thereon, which shall be settlement in full of all claims." This is a provision aside from and added to the warranty, and is intended to secure the supply of the kind ordered or something "equally as good." It has nothing to do with the case of stock supplied without sufficient vitality; and the phrase "settlement of all claims" must refer only to the case mentioned, and is not more general. That this is the correct interpretation is seen by a reference to the clause in the contract giving the plaintiffs the right to send varieties considered by them equally desirable if the specified varieties cannot be furnished.

Accordingly we see that there is a warranty of condition but not of kind or variety: if there be a mistake in the kind sent, that sent must be replaced free, or the purchase price repaid with in-

terest, and that will settle all claims against the plaintiffs for sending the wrong kind.

Perhaps the more difficult question remains. At the end of the contract appears the following: "All stock that fails to live to be replaced at half price, provided you are notified by August 1st next. Cash to accompany notice." It is argued that the contract itself provides for the particular breach which occurred, and that the sole remedy is that given in the clause just recited.

Very considerable discussion took place in the case of *Boyd v. Shaw-Cassils Co.* (1908), 12 O.W.R. 913, (1909) 13 O.W.R. 991, as to the rights of a contractor to whom the provisions of the contract give certain powers in case of breach by the other.

I have again considered the authorities, and see no reason to change the views I expressed in pp. 992, 993 of the report, that the injured contractor is not restricted to the contract remedy, as his right to bring an action does not arise out of the contract at all but is a new right given by the law.

The present case is stronger against the plaintiffs than the case just referred to. After giving an express warranty, they promise that in case the defendant notify them by the 1st August next, they will replace the dead stock at half price. There is no provision, as in the early part of the contract, that this shall be settlement of all claims, and the whole effect of the provision is that, if the defendant sees fit before the 1st August to notify them, they will replace the dead stock with living at half price. There is no reason why both warranty and this provision should not co-exist; the defendant might well claim the replacing of dead stock at half price without releasing his rights under the warranty; at all events he is not compelled to claim replacement.

In the *Boyd v. Shaw-Cassils* case the defendants had exercised the remedy given them by the contract, and consequently they were held precluded from other relief. Here the defendant has not, and there is no reason why he should not claim under the warranty.

As to damages, the defendant knew in 1906 that most of the trees were dead; he cannot be allowed to increase the damages by leaving his land idle. But, taking the evidence of the defendant as accurate (and the learned trial Judge gives him a certificate of credibility), I do not think that the amount allowed by His Honour is excessive, *viz.*, \$200. I do not think, however, that the amount

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should be increased by us, nor do I think it should be left at large so that the defendant might bring another action for a further amount, as in *Webster v. Armstrong* (1885), 54 L.J.N.S.Q.B. 236.

There should be an adjudication that the damages to which the defendant is entitled under his counterclaim are \$200, and with that adjudication the motion and cross-motion should be dismissed, both with costs.

FALCONBRIDGE, C.J.K.B., and BRITTON, J., concurred in the result.

G. F. H.

[IN THE COURT OF APPEAL.]

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June 30.

REX V. POLLARD AND TINSLEY.

Criminal Law—Abortion—Defence—Lawful Operation—Evidence in Reply of Previous Criminal Act—Unlawful Intent—System—Inadmissible Evidence—New Trial.

an indictment of the defendants (P., a physician and surgeon, and T. a boarding-house keeper) for procuring an abortion, the case for the Crown was that the defendants had performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, and the defendant P. swore that the operation was performed for a lawful purpose, and without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that P. had been employed to operate and had operated upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or, in other words, to prove the unlawful intent:—

Held, that the testimony of these witnesses was improperly admitted, there being no evidence of a system which would let in proof of a single prior criminal act as part of it.

The King v. Bond, [1906] 2 K. B. 389, discussed.

The conviction of the defendants was set aside, and a new trial was directed under sec. 1018 (b) and (d) of the Criminal Code.

CASE stated by the Chairman of the General Sessions of the Peace for the county of York, pursuant to an order of the Court of Appeal:—

“1. Stephen B. Pollard and Mary Tinsley were tried in the General Sessions of the Peace for the county of York, on the 24th day of March, 1909, and were by the jury found guilty of procuring an abortion upon the person of one Elizabeth O’Brien.

"2. Both of the prisoners were called as witnesses in their own behalf, and the presence of Elizabeth O'Brien in the Tinsley house and visits and treatment by the prisoner Pollard were admitted. Both prisoners were cross-examined as to other improper acts by the prisoner Pollard at the female prisoner's house on other occasions, both denying any improper conduct on their part.

"3. The prisoner Pollard admitted in his evidence that he had operated on the person of Elizabeth O'Brien by curretting her womb, but stated that such action on his part was proper and necessary, and expressly denied that his interference or operation on the person of the O'Brien woman was done with intent to procure an abortion.

"4. At the close of the defence the prosecuting attorney called, in reply, Mary Addison and John Addison, who had been brought into court during the cross-examination of the prisoner Pollard, who denied all knowledge of them, and that he had performed an operation on the person of Mary Addison for the purpose of procuring an abortion. The prisoner Tinsley, on her cross-examination, also denied all knowledge of the Addisons.

"5. The evidence of Mary Addison and John Addison was objected to by counsel for both prisoners, on the ground that the contradiction involved by it was on an immaterial issue, and that the prosecution was bound by the answers made by the prisoners and could not contradict them.

"6. I overruled the objection, and admitted such evidence, but gave the right to both prisoners to call any further and other evidence which they might require, on surrebuttal, following the authority notably of *The King v. Higgins* (1902), 7 Can. Crim. Cas. 68; *The King v. Bond*, [1906] 2 K.B. 389; and *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57.

"7. The prisoners called no further evidence.

"8. The indictment and the notes of evidence taken at the trial are referred to and made part of this case.

"9. The question which I now beg to submit, under the direction of the Honourable the Justices of the Court of Appeal for Ontario, for the opinion of that Court, is: Was I right in admitting the evidence of Mary Addison and John Addison, as above described?"

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The case was heard by MOSS, C.J.O., OSLER, GARROW, MAC-LAREN, J.J.A., and TEETZEL, J., on the 13th May, 1909.

T. C. Robinette, K.C., and *A. A. Bond*, for the defendants. Intent is a part of the indictment, and it must be proved by the Crown in chief. Mary Addison was called in rebuttal to prove intent, and her husband was called to corroborate her. The evidence was improperly admitted. Even in chief, it would not have been admissible against the defendants. It disclosed, in fact, another crime. [Discussion of cases referred to by the Chairman in the stated case.] *The King v. Bond*, [1906] 2 K.B. 389, is entirely in the defendants' favour; the evidence there was given in chief. [Counsel also referred to and discussed *Commonwealth v. Corkin* (1884), 136 Mass. 429; *Regina v. Dale* (1889), 16 Cox C.C. 703; *The King v. Wyatt*, [1904] 1 K.B. 188.] We rely on *Regina v. Oddy* (1851), 5 Cox C.C. 210, 2 Den. C.C. 264; *The Queen v. Carter* (1884), 12 Q.B.D. 522; *Regina v. Drage* (1878), 14 Cox C.C. 85; *Regina v. Holt* (1860), 8 Cox C.C. 411; *Regina v. Fuidge* (1864), 9 Cox C.C. 430; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, 17 Cox C.C. 704; *Regina v. Francis* (1874), 12 Cox C.C. 612; *Griffiths v. Payne* (1839), 11 A. & E. 131. Evidence would be admissible to rebut accident: *The Queen v. Bailey* (1847), 2 Cox C.C. 311; *Regina v. Dossett* (1846), 2 C. & K. 306; *The Queen v. Geering* (1849), 18 L.J.N.S.M.C. 215; *Regina v. Roden* (1874), 12 Cox C.C. 630; but that is not this case. If the evidence was improperly admitted, a substantial wrong has been done, and the conviction should be quashed; it is not a case in which a new trial should be granted. See the Criminal Code, R.S.C. 1906, ch. 146, sec. 1019; *Regina v. Bertrand* (1867), 10 Cox C.C. 618; *The Queen v. Gibson* (1887), 18 Q.B.D. 537; *Connor v. Kent*, [1891] 2 Q.B. 545; *Attorney-General for New South Wales v. Murphy* (1869), 11 Cox C.C. 372; *Bray v. Ford*, [1896] A.C. 44; *The Queen v. Corby* (1898), 1 Can. Crim. Cas. 457; *Rex v. Drummond* (1905), 10 O.L.R. 546; *Rex v. Brooks* (1906), 11 O.L.R. 525; *Rex v. Sunfield* (1907), 15 O.L.R. 252.

J. R. Cartwright, K.C., for the Crown. The question turns on *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, and *The King v. Bond*, [1906] 2 K.B. 389. [Discusses those cases.] This is really a question rather of the weight than the

admissibility of the evidence. Such evidence can be admitted only in cases where intent has to be shewn. In this case the acts are linked closely together. If the evidence is admissible against Pollard, it is also admissible against Tinsley; the operation was in her house, and she was on the spot. If the evidence was inadmissible, there was merely a mistrial, and there should be a new trial.

Robinette, in reply.

June 30: OSLER, J.A.:—The case for the Crown was that the defendants had performed an unlawful operation upon a woman named O'Brien for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury.

The defence was then entered upon, and the defence set up was that the operation was performed for a lawful purpose and without any criminal intent, and this was sworn to by the accused Pollard.

He was cross-examined as to whether he had not, some weeks previously, performed an operation for the purpose of producing an abortion upon a person then in court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that the accused had been employed to perform and had performed an operation upon her for such purpose. Was this evidence admissible as tending to rebut the evidence of the accused that the act he was indicted for was the innocent act he alleged it was; in other words, to prove the unlawful intent?

This point was not actually decided in the recent case of *The King v. Bond*, [1906] 2 K.B. 389, but it would seem, from the opinions of the majority of the Judges who took part in the decision, that the evidence was not, in the circumstances, admissible.

The importance of the question justifies a brief analysis of the case, which was one of the same character as the case at bar.

The prisoner was charged with having feloniously used instruments upon Ethel Annie Jones, a pregnant woman, with intent to procure her miscarriage. Evidence was given of the use of instruments, but it was "suggested" in defence that such use

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was for a lawful purpose and with no criminal intent. The evidence of one Gertrude Taylor was tendered to shew intent. The evidence was admitted against objection, and she proved the attempted commission by the prisoner upon herself, several months before, of an unlawful act similar to that charged against him in the indictment. She further deposed to a statement then made to her by the accused that he "had put dozens of girls right." A case stated by the trial Judge for the consideration of the Court of Crown Cases Reserved was heard by a Court of seven Judges. There was much difference of opinion, but the conviction was sustained by a majority, on the ground that the admissions and statements of the accused made to the witness Taylor tended to shew that he was in the habit of performing similar operations for the same illegal purpose, and that her evidence was admissible as tending to establish a systematic course of conduct of which the act charged in the indictment and the operation upon the witness formed part, and as negating any accident or mistake or the existence of any reasonable or honest motive: *The King v. Wyatt*, [1904] 1 K.B. 188; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *Regina v. Makin* (1893), 14 N.S. W.L.R. 1.

The two learned Judges, Lord Alverstone, C.J., and Ridley, J., who dissented, held that, under the particular circumstances, the evidence was not admissible, apparently on the ground that the prosecution was based (as in the case before us) on the commission of the single act and offence charged, the act being admitted, though the wrongful intent was denied, and that, as *prima facie* there was no necessary connection between the act charged in the indictment and the act alleged in the evidence admitted, the ground that it tended to shew a system or course of conduct on the part of the accused which was not alleged as part of the case for the prosecution was too dangerous and not sufficient to justify its admission for the purpose of proving intent in the particular case charged.

Two of the other Judges, Kennedy and Bray, JJ., concurred in upholding the conviction on the ground that the statement of the accused deposed to by the witness Taylor went to prove the existence of an illegal system or course of practice on the part of the accused. "When evidence has been given of a

system it becomes permissible then to prove any case which forms part of the system, and the operation which the accused attempted on her (Taylor) tended to corroborate the evidence she gave as to the statements he made to her:" Bray, J., at p. 419. And Kennedy, J., after citing *Regina v. Cooper* (1849), 3 Cox C.C. 547, as authority for the proposition that the evidence of the admission by the prisoner of a course of conduct could not be excluded, went on to say (p. 405): "In my opinion it does not follow that to prove a criminal intent it is competent to the prosecution to prove the occurrence of a single prior act of the like criminal nature. The admissibility, not merely the weight, of the evidence depends, in my view, upon the evidence which it is proposed to adduce being evidence of such conduct as would authorise a reasonable inference of a systematic pursuit of the same criminal object; . . . there is not (here) in strictness a question of accident or mistake. It was not disputed that the accused, a qualified surgeon, as I understand the facts, had used the surgical instruments upon Ethel Annie Jones. Did he use them for a lawful or for an unlawful purpose? That was the sole issue. In other words, had he or had he not in using them the *mens rea*? In my opinion, if the evidence here had consisted solely of the single act alleged by the witness Gertrude Taylor to have been done to her nine months before, it ought not to have been admitted. Such a single isolated act is not just ground for any inference, and an act from which no inference can justly be drawn ought not to be allowed to be before the jury."

Bray, J., expressed a similar opinion. Lawrence, J., I think, took the same view, though he did not express it so plainly; speaking as he does (p. 420) of "an act of the same character under similar circumstances on other occasions;" and (p. 421) of evidence being admissible to rebut the defence that the act was honestly done "by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The number of the cases and the peculiarity of the circumstances tend to shew the improbability of the innocent intention."

Jelf, J. (and probably Darling, J., also), was of opinion that

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if only a single case was brought forward, the weight only, and not the admissibility, of the evidence would be affected. And Lord Alverstone, while of opinion that the admission of the evidence in the case in question could not, under the circumstances, be justified as tending to establish a system or course of conduct on the part of the prisoner, added (p. 395): "I must not, however, be supposed to decide that there might not be cases in which the evidence would have been admissible on such grounds, but this does not appear to me to be one of them. Nor does it by any means follow that evidence will be inadmissible on the ground only that it goes to prove one other criminal act and not one of a number. There may be other circumstances shewing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part. The mere fact that the evidence tendered pointed only to one act is not conclusive against the admissibility." Then he refers to the cases in which such evidence would be admissible to rebut the allegation of accident or mistake, where that was the defence relied on, and adds (p. 396): "In this case, assuming, as I have said, the grounds upon which the evidence might be admitted not to apply, the case appears to me to be very near to that of *Regina v. Oddy*, 5 Cox C.C. 210, in which, before the Prevention of Crimes Act, 1871, sec. 19, evidence of the possession by the prisoner of property other than that charged in the indictment stolen from other persons was held not admissible."

The only difference between the opinion of the two dissenting Judges and those of Bray and Kennedy, JJ., and perhaps of Lawrence, J., really is that the former thought there was no sufficient proof of system in the statements of the prisoner, while the three latter thought that there was, and therefore affirmed the propriety of the admission of the evidence, which, had it been confined to proof only of the isolated prior act, they, or two of them, at all events, would, equally with their dissenting colleagues, have rejected.

In the case before us the evidence of system which carried the day against the accused in *The King v. Bond*, *supra*, or anything approaching it, which would let in proof of the single prior criminal act as part of a system, is wanting; and, therefore, in my opinion, the conviction of the prisoners cannot stand. I

entirely agree with the observation of Kennedy, J., in the passage where he says, at p. 398: "If, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England" (recognised, as he points out, by the Legislature in creating exceptions to it), "which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

The case of *Hill and Lane* (1908), 1 Cr. App. R. 158, 160, may also be referred to.

It was strongly urged by Mr. Robinette that the evidence objected to, if admissible at all, should have formed part of the Crown's case in the first instance, and that it was erroneous to admit it in reply. Whether in the *Bond* case Taylor's evidence was given by anticipation, on the opening of the case for the prosecution, knowing the defence intended to be relied upon, or, as here, in reply after the close of the defendant's case, does not clearly appear from any of the numerous reports of the decision,* though from the judgment of Darling, J., it may perhaps be inferred that the course of the proceedings was similar to that in the present case. In my view, however, the point is of no importance. If admissible at all, the evidence might, by leave of and in the discretion of the trial Judge, be given at either stage of the case for the purpose of disproving honesty of motive, if that were the defence relied upon, or of rebutting a defence of accident or mistake, or to contradict the defendant on a point material to the charge, as in *The King v. Higgins*, 7 Can. Crim. Cas. 68.

Under all the circumstances, we are of opinion that the conviction should be set aside, but the case is one in which, under sec. 1018 (b) and (d) of the Code, we should direct a new trial, instead of directing a discharge of the prisoners, and this accordingly will be the order of the Court.

* See 75 L.J.K.B. 693; 70 J.P. 424; 54 W.R. 586; 95 L.T. 296; 21 Cox C.C. 252; 22 Times L.R. 633.

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MACLAREN, J.A.:—The accused, a physician and a boarding-house keeper, were found guilty by a jury, at the sessions in Toronto, of having procured an abortion, at the house of the latter, on the person of one Elizabeth O'Brien.

Both of the accused gave evidence on their own behalf, and denied the charge. In cross-examination they were asked if the doctor had not, shortly before, performed a like operation on the person of another woman, at the same house, and they both denied any knowledge of such an act.

In rebuttal this latter woman and her husband were called to prove this charge, counsel for the defence strongly objecting. A reserved case was asked for and refused, and, on application to this Court, the county court Judge was directed to state a case as to whether the evidence of these two witnesses was properly received, which he did.

On the argument of this case before us, Mr. Robinette strongly urged that, even if the Crown had the right to produce the evidence to shew intent, or that it was part of a system practised by the accused, this being a material part of the charge in the indictment, the evidence, if admissible at all, should have been given in chief, and not reserved for rebuttal.

From an examination of the reports of the cases in which for certain offences such evidence has been admitted, it appears that in some of them it was produced as part of the evidence in chief on behalf of the Crown; in others it does not appear clearly from the reports whether it was in chief or in rebuttal; but in none of the cases to which we were referred does the report shew, as far as I could find, that it had been in rebuttal.

This point is, however, of less importance, in view of the fact that the time or stage of the trial at which evidence may be admitted is in a great measure in the hands of the trial Judge, who has a large discretion in this regard: Roscoe's Criminal Evidence, 13th ed., p. 123. Also in view of sec. 1019 of the Criminal Code, which reads as follows: "No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial. . . ."

When the trial Judge decided to receive the evidence, he informed the defence that he would allow them to bring evidence in rebuttal, but the offer was declined. It was not contended by the defence, either at the trial or before us, that they were put to any substantial disadvantage as to the time of the offering of the evidence; they were standing upon what they considered their strict rights, so that the objection became largely a technical one.

If this were the only ground of objection, I do not think it would be, in the special circumstances of this case, entitled to prevail.

The admission of evidence of this nature, which goes to shew the commission of similar offences by the accused at other times than that charged, has, however, been always carefully restricted. The cases in which it was first received were cases of the uttering of forged paper and of fraud, and it appears to have been for some time confined to these. See *Regina v. Oddy*, 2 Den. C.C. 264, at p. 272; and *Regina v. Winslow* (1860), 8 Cox C.C. 397. The case of *Regina v. Geering*, 18 L.J.N.S.M.C. 215, appears to be the first in which it was acted upon in a case of murder. In another murder case, *Makin v. Attorney-General for New South Wales*, [1894] A.C. at p. 65, Herschell, L.C., says: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." As stated in that case by his Lordship, it is easier to lay down the principle which should govern than to apply it in the particular case, and it is often difficult to draw a line and to decide whether a particular piece of evidence is on the one side or the other.

In the recent case of *The King v. Wyatt*, [1904] 1 K.B. 188,

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which was a case of fraud, Lord Alverstone, C.J., held that evidence given there was "clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negating any accident or mistake or the existence of any reasonable or honest motive," and his judgment was concurred in by the four other Judges who heard the case.

The authorities chiefly relied upon to support the decision in the present case, by the trial Judge and by Mr. Cartwright in his argument before us, were the *Makin* case above referred to and that of *The King v. Bond*, [1906] 2 K.B. 389, 21 Cox C.C. 252. This last case is remarkable for the diversity of views of the seven Judges who heard it. After a careful examination of their wonderfully divergent opinions, and giving to the subject the best consideration of which I am capable, I have come to the conclusion that if we should sustain the present conviction, we should be pushing the principle involved in the admission farther than has yet been done in any case to which we have been referred or which I have been able to find; and I think it is a principle that should not be unduly or lightly extended.

When such evidence is properly admissible, I think its purpose and object should be explained to the jury. It is quite true that during the discussion which arose when this evidence was about to be introduced, it was stated that it was for the purpose of proving intent, yet the attention of the jury was not drawn to this point, in the charge, where there is only a brief and meagre reference to it, and their attention was not called to the very different positions in which the two prisoners may stand with regard to it or how differently it might have affected them, and it may be that the female prisoner was prejudiced by such omission.

In my opinion, in view of the unsatisfactory manner in which this evidence was dealt with, there should be a new trial.

MOSS, C.J.O., GARROW, J.A., and TEETZEL, J., concurred.

E. B. B.

[DIVISIONAL COURT.]

REX v. DOMINION BOWLING AND ATHLETIC CLUB LIMITED.

D. C.

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July 14.

Club—Incorporation under Ontario Companies Act—"Proprietary Club"—Billiard Tables and Bowling Alley on Club Premises—Municipal By-law Requiring License—"Hire or Gain"—"House of Public Entertainment or Resort"—Police Magistrate—Case Stated under Ontario Summary Convictions Act—Forum—Divisional Court—Scope of Case—Admissibility of Evidence.

A club was incorporated by letters patent under the Ontario Companies Act, to encourage and promote billiard playing and other athletic and amateur sports, etc. The members were all shareholders in the capital stock of the club, and no person could become a member unless he subscribed for and became the holder of a share or shares, and no person other than members were permitted to have the use of the club premises. Premises were leased by the club in the city of Toronto, whereon there were bowling alleys and billiard tables. Fees were paid by the members for games played on the bowling alleys and billiard tables, and such fees went into the funds of the club and were used for paying the expenses of managing and carrying on the club. By a resolution of the club, the directors were empowered to apply fees paid for games played on the alleys or tables of the club as payment for shares subscribed.

A by-law of the police commissioners for the city of Toronto, passed pursuant to the powers conferred by the Consolidated Municipal Act, 1903, sec. 583, sub-secs. 4 (as amended by 8 Edw. VII. ch. 48, sec. 14) and 10, provided that a license should be taken out by (9) every person who, for hire or gain, directly or indirectly keeps or has in his possession, or on his premises, any billiard table, or who keeps or has a billiard table in a house or place of public entertainment or resort, and every proprietary club (as defined by the Consolidated Municipal Act, 1903), which directly or indirectly keeps or has in its possession or on its premises any billiard table; and also (10) by every person who owns or keeps for hire or profit a bowling alley.

The club had no license for billiard tables or for a bowling alley:—

Held, that the club was not a "proprietary" one, as defined by the amending Act, 8 Edw. VII. ch. 48, sec. 14; and (RIDDLELL, J., dissenting) that the billiard tables and bowling alley were not kept or in the possession of the club for hire or gain, directly or indirectly, nor was the place where the tables were kept a house of public entertainment or resort, within the meaning of the by-law.

Newell v. Hemingway (1888), 60 L.T.R. 544, applied and followed.

Held, per curiam, that cases stated by a police magistrate under R.S.O. 1897, ch. 90, secs. 2 (1) and 8, as amended by 1 Edw. VII. ch. 13, sec. 2, and so (by reference) under R.S.C. 1906, ch. 146, sec. 761, properly came before a Divisional Court, under 4 Edw. VII. ch. 11, sec. 2 (Judicature Act, sec. 67, sub-sec. (1) (e)); but that, under sec. 761, all that can be done is to "question a conviction, order, determination or other proceeding," and so a question as to the admissibility of evidence cannot form part of a stated case. And, *per RIDDLELL, J.*, that the evidence taken before the magistrate should not be sent up by him as part of the case.

Semble, per FALCONBRIDGE, C.J.K.B., that the magistrate was right, on a charge preferred against the incorporated club, in refusing to allow questions to be put to a witness with the object of shewing that the club was incorporated for the purpose of enabling an individual to evade the provisions of the by-law.

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Two cases stated by one of the police magistrates for the city of Toronto.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The two cases depend upon the same facts to a great extent: these facts are thus stated by the police magistrate:—

(1) The Dominion Bowling and Athletic Club Limited was incorporated by letters patent on the 9th day of September, 1908, under the provisions of the Ontario Companies Act, with the following objects:—

(a) To encourage and promote billiard and pool playing, bowling, boxing, and other athletic and amateur sports.

(b) To maintain and conduct an athletic club.

(c) To deal in sporting goods, and, for the purposes aforesaid, to construct, acquire, and operate billiard tables, pool tables, and bowling alleys, and other necessary premises.

(2) The capital stock of the club is \$40,000, divided into 40,000 shares of \$1 each.

(3) The charter declares that it is granted on the condition that it may be forfeited and cancelled if the club or any member shall deal in any alcohol, etc., or spirituous liquor, upon the premises of the club, and further declares that it may be forfeited and cancelled if any gambling is carried on upon the premises.

(4) The members of the said club are all shareholders in the capital stock of the said club, and have an interest in the assets and property of the club to the extent of and in virtue of the shares so held. No person can become a member of the club unless he subscribes for and becomes the holder of a share or shares in the capital stock.

(5) No persons other than members of the club are permitted to have the use of the club premises or play games on the bowling alleys and billiard and pool tables of the club.

(6) The by-laws of the said club also provide (by-law No. 29) "that only shareholders in the capital stock of the Dominion Bowling and Athletic Club Limited shall be permitted to become members of the said club and have the use and benefit and the privileges of the club and of the club rooms and be permitted to use and play on the bowling alleys and billiard and other tables on the club premises."

(7) Premises have been leased by the said club for the purposes of the said club at 501 and 503 Queen street west, in the city of Toronto, and lease taken to and in the name of the club. On such premises there are bowling alleys and billiard and pool tables.

(8) Fees are paid by the members of the club for games played on the bowling alleys and billiard and pool tables, and such fees go into the funds of the club and are used for paying and defraying the expenses of managing and carrying on the club. No annual or other fees are payable by members.

(9) There are no provisions in the charter or by-laws of the said club as to the application of the surplus revenue, if there should be any after payment of expenses.

(10) The president holds 3,000 shares, the secretary-treasurer 3,000 shares, on which ten per cent. has been paid, and the other three directors 10 shares each, and 498 other shareholders 1 share each in the capital stock of the club. The balance of the capital stock has not been subscribed for.

(11) By resolution passed at the first general meeting of the club, the directors were empowered to apply fees paid for games played on the alleys or tables of the club to the amount of \$1 from each shareholder as payment for shares subscribed.

(12) J. H. Bennett, the secretary-treasurer and manager, receives a salary of \$2,000 and free quarters, as such, and devotes all his time to the management and affairs of the club.

(13) The counsel for the prosecution asked leave to put questions to the manager of the club, J. H. Bennett, a witness called on behalf of the prosecution, and the only witness called, for the purpose of shewing that the club was incorporated for the purpose of evading the provisions of the by-law, and also for the purpose of shewing that J. H. Bennett promoted the incorporation of the Dominion Bowling and Athletic Club Limited with the object of obtaining an occupation and means of livelihood for himself, but I refused to allow such questions to be put.

(14) The club has no license to carry on a bowling alley under the by-law. The club has no license to keep or have in its possession or on its premises billiard or bagatelle tables.

The police magistrate convicted the club for the offence of keeping for hire or profit a bowling alley, contrary to by-law

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No. 23 of the police commissioners for the city of Toronto, but acquitted in respect of billiard tables. Counsel for the defendants desired "to question the validity of the said conviction;" and accordingly the police magistrate stated one of these cases; counsel for the prosecution desired "to question the validity of" the other "decision;" and accordingly the police magistrate stated the other case. The questions submitted for the judgment of the Court were stated as follows:—

In the former:—

1. Whether this club, incorporated under letters patent of the Province of Ontario, is subject to the provisions and restrictions of by-law No. 23 of the police commissioners for the city of Toronto.

2. Whether the word "person," as used in the by-law No. 23 of the police commissioners for the city of Toronto, includes an incorporated club such as this club.

3. Whether the Dominion Bowling and Athletic Club Limited carries on business for hire or profit within the provisions of by-law No. 23 of the police commissioners, and within the provisions of the Consolidated Municipal Act, 1903, sec. 583, as amended by 8 Edw. VII. ch. 48, sec. 14.

4. Whether by-law No. 23 of the police commissioners for the city of Toronto, if it affects a club not doing business with the general public, is *ultra vires* of such police commissioners.

5. Whether the fact of a club providing bowling alleys on the club premises and collecting fees from its members for games played thereon, constitutes an owning or keeping of bowling alleys for hire or profit within the terms of by-law No. 23 of the police commissioners, and within the provisions of the Consolidated Municipal Act, 1903, sec. 583, as amended by 8 Edw. VII. ch. 48, secs. 14 and 15.

6. Whether I should have permitted questions to be put with the object of shewing that said club was incorporated to evade the provisions of the by-law or of shewing that J. H. Bennett, the manager of the club, promoted the incorporation of the club to obtain a position for himself, and whether, in the event of these facts being proved, the defendant should be convicted of the offence charged.

In the other:—

1. Whether, by reason of the amendment of sec. 583, sub-sec. 14, of the Consolidated Municipal Act, by 8 Edw. VII. ch. 48, sec. 14, an incorporated company, such as the defendant here, may keep or have in its possession or on its premises billiard or bagatelle tables, charging a fee for games played thereon, without a license, while, under sub-sec. 10 of the said section and by-law No. 23 of the board of police commissioners, it is necessary for such a company to take out a license for keeping bowling alleys charging a fee for playing thereon.

2. Whether, upon the facts above set out, the defendant should have been convicted of the offence charged.

3. Whether I should have permitted questions to be put with the object of shewing that the said club was incorporated to evade the provisions of the by-law or of shewing that J. H. Bennett, the manager of the club, promoted the incorporation of the club to obtain a position for himself, and whether, in the event of these facts being proved, the defendant should have been convicted of the offence charged.

The by-law referred to, No. 23 of the consolidated by-laws of the police commissioners, as amended by by-law No. 64, passed on the 9th June, 1908, is, so far as material, as follows:—

2. There shall be taken out by . . .

(9) Every person who, for hire or gain, directly or indirectly keeps or has in his possession, or on his premises, any billiard or bagatelle table, or who keeps or has a billiard or bagatelle table in a house or place of public entertainment or resort, whether the said billiard or bagatelle table is used or not; and every proprietary club (as defined by the Consolidated Municipal Act, 1903), which directly or indirectly keeps or has in its possession or on its premises any billiard or bagatelle table;

(10) Every person who owns or keeps for hire or profit a bowling alley; . . .

a license authorising them respectively to carry on their several trades, callings, and businesses in the city, for which said license the person obtaining the same shall pay at the time of taking out of such license such fee as may from time to time be prescribed therefor by by-law of the corporation of the city of Toronto passed for that purpose.

Provided, however, that no license fee shall be payable by the

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Industrial Exhibition Association of Toronto, the Provincial Agricultural Exhibition, or any other association or society mentioned in the Agricultural and Arts Act, or by the Ontario Society of Artists, or by the Woman's Art Association, or by any persons giving any exhibition, musical, dramatic, or other performance for the benefit of any religious or charitable institution of the city.

The stated cases were heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 1st April, 1909.

I. F. Hellmuth, K.C., for the defendant. The jurisdiction of the police commissioners is under sec. 583, sub-secs. 4 and 10, of the Municipal Act, 3 Edw. VII. ch. 19; and sub-sec. 4 is amended by 8 Edw. VII. ch. 48, sec. 14.* The amendment does not affect bowling alleys. The magistrate held that this was not a proprietary club, because there were none but shareholder members. There is really no distinction between the two cases, and there should not have been a conviction in either. The word "person" has the same meaning in all the clauses. This is a trade by-law; the magistrate overlooked that. The trade must be carried on for profit to bring it within the statute and the by-law. I refer to *Graff v. Evans* (1882), 8 Q.B.D. 373; *Newell v. Hemingway* (1888), 60 L.T.R. 544; *In re Gun Lang* (1900), 7 B.C.R. 457; *Smith v. Anderson* (1880), 15 Ch. D. 247; *New York Life Insurance Co. v. Styles* (1889), 14 App. Cas. 381; *In re Siddall* (1885), 29 Ch. D. 1. As to the form of the case, see *Rex v. Ferguson* (1906), 12 O.L.R. 411; and *S. C., sub nom. Rex ex rel. Burke v. Ferguson* (1906), 13 O.L.R. 479. The conviction should be against the

* 583. By-laws may be passed . . . by the board of commissioners of police in cities having 100,000 inhabitants or more:—

4. For licensing, regulating and governing all persons who for hire or gain, and proprietary clubs which directly or indirectly keep, or have in their possession or on their premises any billiard or bagatelle table, or who keep or have a billiard or bagatelle table in a house or place of public entertainment or resort, whether such billiard or bagatelle table is used or not, and for determining the time during which licenses shall be in force. The words "proprietary club" for the purposes of this sub-section shall be deemed to mean a club wherein the members or some of them are not shareholders of the said club, or in some similar manner interested in the assets of the club.

10. For preventing or regulating and licensing exhibitions held or kept for hire or profit, theatres, music halls, bowling alleys and other places of amusement.

manager, if any one—that is, if he is running the club for his own profit, under colour of the club incorporation.

F. R. MacKelcan, for the prosecutor. The decision in *Graff v. Evans*, 8 Q.B.D. 373, does not apply to this case, as the defendant is an incorporated company with a share capital. The question as to whether the principle of *Graff v. Evans* could be applied to an incorporated company was discussed in *National Sporting Club Limited v. Cope* (1900), 82 L.T.R. 352, and expressly left undecided by the Divisional Court. If that principle could be applied to any incorporated company, it could only be by analogy, as the corporation is a legal entity distinct from the persons composing it, and the legal rights of the shareholders in relation to the company are entirely different from those of members in relation to the club. It may be fair and reasonable to extend the principle of *Graff v. Evans* to the case of incorporated companies without share capital, of the same character as the Rideau Club, but the decision in *Rideau Club v. City of Ottawa* (1907), 15 O.L.R. 118, shews that clubs with share capital are in a totally different category. *Newell v. Hemingway*, 60 L.T.R. 544, does not govern this case. The actual decision there was that the sale could not be by the manager in any event, and the remarks as to the liability of the incorporated club were purely *obiter* and in regard to a point not argued. In the Scottish case of *McWilliams v. Main* (1902), 39 Sc. L.R. 491, the incorporation was not one with a share capital. Reference also to *Newman v. Jones* (1886), 17 Q.B.D. 132; *Bowyer v. Percy Supper Club*, [1893] 2 Q.B. 154; *Smith v. Anderson*, 15 Ch. D. 247, at p. 258; and Wertheimer's Law of Clubs, pp. 1 *et seq.*, 32. In any event the magistrate had power to pass and should have passed upon the *bona fides* of the club, and the evidence in this case, shewing that the share capital is divided into dollar shares, and that the vast majority of these shares are held by the president and manager, while the persons who play obtain \$1 shares after playing a certain number of games, in return for the money paid in, clearly establishes that the club is not a *bonâ fide* one. In making a finding that it was not *bonâ fide*, the magistrate would not be going behind the charter issued by the government, but would merely be determining the effect to be given to the issuing of such a charter in the circumstances of this case. The magistrate should have allowed the witness to be asked ques-

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tions directed to shewing that the club was incorporated for the object of evading the by-law, and the Court has power to send the case back to the magistrate to take this evidence: Archbold's Quarter Sessions Practice, 4th ed. (1885), pp. 903 *et seq.*; *Rex v. Page* (1765), 2 Bott's Poor Law Cases 764; *The King v. Bloxam* (1834), 1 A. & E. 386. The word "person" in the by-law includes company without any special defining clause: *Hirst v. West Riding Union Banking Co.*, [1901] 2 K.B. 560; *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; other clauses of the by-law shew that it was intended to govern corporations. For example, the clause exempting the Industrial Exhibition Association from the operation of the by-law. In any case the word "person" should be given the same meaning as in the provincial statutes: *In re Hassard and City of Toronto* (1908), 16 O.L.R. 500, *per* Teetzel, J., at p. 507; *per* Riddell, J., at p. 518. The same argument applies in the billiard tables case as in the bowling alley case. It is not necessary to rely on the amendment, 8 Edw. VII. ch. 48, sec. 14, defining for the purpose of sec. 583, sub-sec. 4, the words "proprietary club." This amendment was plainly made for the facilitating of prosecutions, and should not be interpreted to make the section less broad than it was before. The object of the amendment was to enable clubs to be prosecuted without giving any evidence shewing that the billiard tables were kept for hire or gain. It is proved here that the tables are kept for hire or gain, and therefore there should be a conviction on the same grounds as in the case of the bowling alley.

Hellmuth, in reply. "Club" is excluded from the comprehensive word "person" by the addition of the words "proprietary club." See *Thursby v. Churchwardens, etc., of Briercliffe-with-Extwistle*, [1895] A.C. 32, 37. It must be a place of public resort. I concede that a proprietary club must have a license, whether carried on for gain or not, but this is not a proprietary club. Salaries are not a factor: *Commercial League Association of America v. The People* (1878), 90 Ill. 166.

July 14. FALCONBRIDGE, C.J.:—Case stated by R. E. Kingsford, Esq., one of the police magistrates for the city of Toronto.

An information was laid on the 12th January, 1909, against

the Dominion Bowling and Athletic Club for that it did, contrary to law, for hire or gain, keep or have in its possession and on its premises billiard tables without having any license therefor, contrary to the by-law of the police commissioners for the city of Toronto.

[The learned Chief Justice then set out the by-law.]

On the 11th March the case was heard, and, after hearing the evidence adduced, the learned police magistrate found the accused "not guilty."

The counsel for the prosecution then asked that a case be stated for the opinion of the Court. This he could do under sec. 761 of the Criminal Code if the ground of his request is that the determination of the magistrate is (1) erroneous in point of law or (2) in excess of jurisdiction. Chapter 90, R.S.O. 1897, as amended by 1 Edw. VII. ch. 13, sec. 2, provides that practice and procedure in matters before justices of the peace shall include practice and procedure as to the statement of a case for the opinion of the Court.

The Judicature Act, as amended by 4 Edw. VII. ch. 11, sec. 2, provides that stated cases under R.S.O. 1897, ch. 90, shall be heard by a Divisional Court.

The case is properly before us.

There is no pretence that there was any excess of jurisdiction on the part of the police magistrate, and the only question is whether, upon the facts as stated, the determination was "erroneous in point of law."

In determining this, it is not necessary to consider at all the question whether or not the magistrate was right or wrong in refusing to allow questions to be put with the object of shewing that the club was incorporated for the purpose of enabling an individual either to evade the provisions of the by-law or to provide a situation for himself as manager of the club, but, while it is not necessary to consider that question, I may say that, in my opinion, the magistrate was quite right, on this charge against a corporation, in so refusing.

It might be quite different if the individual was charged, and if the real question to be determined was whether or not that person so charged was not putting forward the name of a club, or association, formed merely for the purpose of evading a statute or by-law.

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Upon the facts, the club charged is not a "proprietary" one, as defined by 8 Edw. VII. ch. 48, sec. 14, which enacts: "The words 'proprietary club' for the purposes of this sub-section shall be deemed to mean a club wherein the members or some of them are not shareholders of the said club, or in some similar manner interested in the assets of the club."

The facts set out in paragraphs 4 and 5 of the case stated shew that this is not a proprietary club.

Then, upon the facts, were the billiard tables kept or in the possession of the defendant for hire or gain directly or indirectly? The magistrate has found that they were not, and, even if we were at liberty to find otherwise upon the facts stated, I would not do so. I can see nothing in the case to warrant a finding that the place where the tables were kept is a house of public entertainment or resort within the meaning of the by-law.

It was argued that, as fees were paid by members of the club for games played on the tables, and as such fees are used for paying and defraying expenses of managing and carrying on the club, that was keeping the tables for hire or gain. It is common knowledge that a club cannot be maintained without money—any more than a private dwelling-house—and, if those who use a table pay for it as one of the ways of paying expenses (salaries or other legitimate expenses), that is in no sense keeping the table for hire or gain as contemplated by the statute and by-law. The hire or gain contemplated is something to be obtained from the general public, for the benefit of the owner of a table kept for the public use for pay.

This case appears to me, upon the facts, to be wholly covered by authority. *Newell v. Hemingway*, 60 L.T.R. 544, is quite in point, and on principle deals with what is really the meaning of a sale to a club member on club premises such as would be in contravention of the license laws. In *In re Gun Long*, 7 B.C.R. 457, it was held that where a by-law requiring a lodging-house keeper to take out a license did not define what was meant by keeping a lodging-house, it did not apply to a person not engaged in such occupation for profit.

That is the crux of the case. The statute never was intended to cut off *bonâ fide* club privileges any more than privileges in a

man's house. "Keeping for hire" is a well-known and fully understood expression.

Graff v. Evans, 46 L.T.R. 347, 8 Q.B.D. 373, was cited and approved of in *Newell v. Hemingway*. The only difference in the cases is that in *Graff v. Evans* the members had not actually formed themselves into a club. They were an association, and the liquor was the property of the members, so that the liquor could not properly be said to be sold to themselves. If liquor could not properly be said to be sold to themselves, whether as in a club or in an association, could a table be hired to one of themselves, or used by one of themselves, so as to be reasonably said to be kept for hire or gain?

I refer also to *McWilliams v. Main*, 39 Sc. L.R. 491.

1. The answer to the first question is that it is not necessary for the defendant to take out a license.
2. The decision of the learned magistrate was right.
3. The third question is not a matter as to which a case can be stated.

In the second case:—

The information was that the Dominion Bowling and Athletic Club Limited did on the 16th December, 1908, contrary to law, own and keep for hire or profit a bowling alley without having a license therefor, contrary to the form of the by-law of the police commissioners for the city of Toronto.

This charge was heard on the 5th February, 1909, and the club was convicted. The wording of sub-sec. 10 of sec. 583 of the Municipal Act of 1903 would possibly (whether that was the intention of the Legislature or not) authorise the commissioners of police to pass a by-law for preventing or regulating and licensing a bowling alley as a place of amusement. The police commissioners did not do this, but, acting upon what they doubtless considered the intention of the Act to be, enacted (as sec. 10 of by-law 23) the following:—

"There shall be taken out by . . . every person who owns or keeps for hire or profit a bowling alley . . . a license authorising him (or them) to carry on his trade, calling, and business" (*i.e.*, as one who owns and keeps for hire a bowling alley) "in the city, for which said license the person obtaining the same shall pay," etc.

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Assuming that the club was formed in good faith as a club, it clearly does not come within the by-law, and what I have said upon the other case applies to this.

The case was stated for the Court because the accused says the determination of the police magistrate is erroneous in law.

1. The answer to the first question should be that, upon the facts submitted, this club is not liable to a penalty for not taking out a license under by-law 23.

2. The word "person" as used in the by-law includes an incorporated company.

3. The Dominion Bowling and Athletic Club, upon the facts stated, did not, as charged, carry on business for hire or profit within the provisions of the Municipal Act.

It is not necessary to answer the other questions.

This conviction should be set aside.

There will be no order as to costs.

BRITTON, J:—I agree.

RIDDELL, J.:—These are two cases stated for the opinion of the Court, by Mr. Kingsford, one of the police magistrates for the city of Toronto. They come before the Divisional Court under 4 Edw. VII. ch. 11, sec. 2,* being stated under R.S.O. 1897, ch. 90, secs. 2 (1) and 8, as amended by 1 Edw. VII. ch. 13, sec. 2, and so (by reference) under R.S.C. 1906, ch. 146, sec. 761.

[The learned Judge then made a statement of the facts as above.]

This section, R.S.C. 1906, ch. 146, sec. 761, gives to "any person aggrieved . . . who desires to question a conviction, order, determination or other proceeding of a justice . . . on the ground that it is erroneous in point of law, or is in excess of jurisdiction," the right to "apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned." And, by sec. 765, "the Court . . . shall hear and determine the question or ques-

* Repealing certain sections of the Judicature Act, and substituting, among other sections, a new sec. 67, by sub-sec. (1) of which, "Subject to rules of Court the following proceedings and matters shall be heard and determined by a Divisional Court of the High Court: . . . (e) Stated cases under the Ontario Summary Convictions Act, and amendments thereto. . . ."

tions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination . . . or remit the matter to the justice, with the opinion of the Court thereon, and may make such other order in relation to the matter, and such orders as to costs, as to the court seems fit." Or, by sec. 766, "the Court . . . shall have power . . . to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended."

It seems necessary to set out the provisions for such cases, as it appears to have been taken for granted that the same matters might be raised under these sections as under sec. 1014 of the Dominion Act, which authorises the Court "to reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge." "Any question of law" may thus be reserved, but under sec. 761 all that can be done is to "question a conviction, order, determination or other proceeding." I do not think a ruling by the magistrate as to the admissibility of evidence is a "proceeding" within the meaning of the Act; nor is it a "determination;" and it is certainly not a "conviction" or "order." We should not, therefore, have been asked to decide as to the admissibility of evidence; and all the other questions, however elaborately framed, are simply in respect to elements to be taken into consideration in determining whether the conviction in the one case and the acquittal in the other were right.

Taking up the bowling alley case, the argument is that it cannot be said that the by-law applies to such a club as this. The by-law is a by-law of the police commissioners, No. 23: "2. There shall be taken out by . . . every person who owns or keeps for hire or profit a bowling alley . . . a license. . . ." Section 38 inflicts a penalty of not exceeding \$50 and costs.

It is argued that this club could not be held to own or keep for hire or profit this bowling alley.

The cases chiefly relied upon are: *Graff v. Evans*, 46 L.T.R. 347; and *Newell v. Hemingway*, 60 L.T.R. 544, both in the Divisional Court.

In the former case the Grosvenor Club, admittedly a *bonâ fide* social club, kept liquor for the use of its members, which was

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supplied to such members as wished it at an advance of 33 per cent. on cost, "that extra sum being the fair and just amount to be paid by the members who consumed the liquors, in order to cover the expenses of that particular branch of the establishment, which it would not be fair to put upon those members who did not make use of any intoxicating liquors:" (per Field, J., at p. 350.) It was held that the supplying of liquor by the manager of the club to a member was not a "sale" by him within the meaning of the Licensing Act, 1872, 35 & 36 Vict. ch. 94, sec. 3 (Imp.), which provides that "no person shall sell or expose for sale by retail any intoxicating liquors without being duly licensed to sell the same." Field, J., says, speaking of the 33 per cent. added: "If that had been found to be 'profit' in the ordinary commercial sense of the word as a 'trade profit,' it would no doubt have been a considerable element in the consideration of the present question:" pp. 349, 350. The learned Judge proceeds to consider what the Legislature was striking at, and says: "Clearly, it is at the trader who gains a profit by selling liquor by retail;" and, after holding that "a sale involves in it something in the nature of a bargain," he finds that the purchaser "was acting solely upon and within his right as a club member, not by reason of any new contract, but by reason of his old contract of association," and that "there was no contract of sale . . . there were no two parties to any contract . . . (the purchaser) was as much a co-owner as the vendor. It was, I think, a transfer of a special property or partial interest in the liquor to" the purchaser. So, too, Huddleston, B., says (p. 350): "Here there was no transfer of the absolute or general property in these liquors, but a transfer of a special interest in them—a transfer, that is, of the interest of the other 1099 members of the club. . . . I cannot think that it was a sale by retail of intoxicating liquors within the meaning of the Act of Parliament." He had already quoted the definition of sale as "a transfer of the absolute or general property in a thing for a price in money." It will be seen that no general principle is laid down—all that is decided is that the particular transaction was not a "sale" within the meaning of the particular statute.

In *Newell v. Hemingway* a number of persons had formed a club as an incorporated company, with 400 shares of 5s. each;

of these 121 had been subscribed for and 1s. paid upon each share. Apart from this paid-up capital, the company depended entirely for the current expenses on cash taken for supplies of exciseable liquors or food to shareholders. The manager sold intoxicating liquors to shareholders; but the Divisional Court, Coleridge, C.J., and Manisty, J., held that he could not be convicted under the Licensing Act, 1872, sec. 3, already referred to. Lord Coleridge says (p. 546): "To call that a sale would be going far beyond the real purpose of the Act of Parliament." And Manisty, J., says: "As the law at present stands, *bonâ fide* clubs are not sellers of intoxicating liquors within the meaning of the Act of Parliament;" but adds: "If there was a sale at all, it was certainly not a sale by the appellant, who was merely obeying orders." The report of the argument shews, I think, that the learned Judge by this meant that the club (if any one) must be the party liable. Nothing in this case carries us any further than the former.

There are a number of English cases along the same lines—the latest I have seen is *Davies v. Burnett*, [1902] 1 K.B. 666, from which it will be seen that the Court is not inclined to go further than the decided cases make imperative. These are all on the meaning of the word "sale" in that particular Act; most of them are mentioned in *National Sporting Club Limited v. Cope*, 82 L.T.R. 352, and the result is, as stated by Channell, J. (p. 354), "that in the cases of purely members' clubs a license is not required, that the form that is gone through in the coffee room or in other parts of the club house where refreshments are sold is, in one sense, not a selling of liquors so as to make the licensing laws applicable, but that it is merely a mode of distributing common property."

I cannot see that a decision upon the meaning of the word "sale" in a particular statute helps to determine the meaning of other words in an entirely different statute.

We have not been furnished with any authority—and I can find none—which says that a club such as this cannot keep for hire or profit a bowling alley or any other article if such article be only used by the members of the club. Even in the case of an ordinary partnership, there could be no difficulty in the partnership, as a partnership, keeping, say, a skiff to be used only by the members of the partnership, these paying a sum for its use.

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If the partnership intended to make a profit for the partnership out of such use of the skiff, why would such skiff not be kept for profit?

And I am unable to understand why a club may not keep a bowling alley in the same way, even though only certain persons—that is, those who are members of the club—are allowed to use it. The question is not, “How is the profit, if any, to be made?” but, “Is it intended that there shall be a profit?” And, in like manner, there is no difficulty in a member of a partnership or of a club “hiring” the chattel of the partnership or of the club. If the bowling alley be kept for hire, even though such hire be to a member of the club, I think the case comes within the by-law.

The judgment of Field, J. (who was not a Judge to use idle words), in the *Graff* case, already cited, seems to me to put an end to any doubt. In the club there under consideration he clearly thinks that the liquor might be supplied to the members so as to make a “profit.” If so, it would, of course, be “kept for profit.” There is nothing, then, in the constitution of that club against keeping for profit—and there is equally nothing here. And neither our statute nor the by-law particularizes for whose profit the bowling alley is to be kept—if it is kept for profit, that is enough.

If the intention of the statute is to be considered, I think that it could not have been the intention of the Legislature to exclude such clubs as this from the power of the municipality. A greater farce could not be conceived than permitting such clubs to be formed in which any one might become a member by playing and paying for a few ends on the bowling alley, and then placing such clubs beyond the government of the city—while, if the person playing and paying for these games only got his game and not a membership in the club, the city would have control; and the same remarks apply to the by-law. I can see no reason for supposing that such clubs should be exempt from the by-law. The by-law is under legislation corresponding to (1903) 3 Edw. VII. ch. 19, sec. 583, sub-sec. 10, giving the board power to pass by-laws “(10) for preventing or regulating or licensing exhibitions held or kept for hire or profit, theatres, music halls, bowling alleys and other places of amusement.” The sub-section is not very happily drawn; the grammatical connection seems to indicate that the phrase

"held or kept for hire or profit" applies only to exhibitions; and bowling alleys generally are within the sub-section. The peculiar wording goes as far back as 1866, at least, 29 & 30 Vict. ch. 51, sec. 284 (6); coming forward in (1873) 36 Vict. ch. 48, sec. 379 (35); R.S.O. 1877, ch. 174, sec. 461 (29); (1883) 46 Vict. ch. 18, sec. 490 (32); R.S.O. 1887, ch. 184, sec. 489 (26); (1892) 55 Vict. ch. 42, sec. 489 (26); R.S.O. 1897, ch. 223, sec. 583 (10); (1900) 63 Vict. ch. 33, sec. 34, adds "theatres, music halls;" (1903) 3 Edw. VII. ch. 19, sec. 583 (10)—so that the history does not assist in determining the meaning. Assuming, however, that the grammatical sense of the sentence is to be accepted, and power is given to license, etc., all bowling alleys, whether held or kept for hire or profit or not, the by-law restricting its operation to those which are so held or kept cannot be said to be unreasonable as discriminating unfairly against any class. One fails to see that it is at all unfair that those who make a profit out of a bowling alley, and consequently desire a constant or frequent use of the alley, should be subject to supervision to which those who have a bowling alley solely for the use of themselves or their invited guests should not be so subjected.

It is argued that "person" in this by-law does not include a corporation. It is not denied that "person" *primâ facie* does include a corporation, but the terms of the by-law and of other by-laws of the same board are pointed to as indicating that such is not the case here. It is true that the terms of the by-laws in some parts are more particularly applicable to individuals than to corporations, but I can find nothing which can be said to exclude the meaning: *e.g.*, sec. 5 provides that "before a license to keep a . . . bowling alley . . . is granted, the chief constable shall ascertain if the applicant therefor is of good character. . . ." In a sense, a corporation may have a good character—"character" here means "reputation," and that a corporation may have. So, too, in the other by-laws referred to.

There is nothing in the facts as found which prevents the police magistrate from finding, as he has done, that this corporation is guilty of an offence against the by-law.

The conviction should be affirmed with costs.

As to the information "for that the said Dominion Bowling and Athletic Club Limited did, contrary to law, for hire or gain,

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keep or have in its possession and on its premises billiard tables without having any license," this is laid under the same by-law, No. 23, sec. 2 (9), which reads thus: "There shall be taken out by . . . every person who for hire or gain . . . keeps or has in his possession or on his premises any billiard . . . table . . . and every proprietary club (as defined by the Consolidated Municipal Act, 1903), which directly or indirectly keeps or has in its possession or on its premises any billiard . . . table."

We are informed that the police magistrate considered that the introduction of the provision as to proprietary clubs, by implication excluded clubs of any other character from the effect of the by-law. This is, in my view, an error. Before the Act of 1908 the section of the Act authorising by-laws in respect of billiard tables was (1903) 3 Edw. VII. ch. 19, sec. 583 (4), giving the board the power to make by-laws "for licensing . . . all persons who for hire or gain . . . keep or have in their possession or on their premises any billiard table. . . ." The by-law of the board followed the statute. Then came the Act of 1908, 8 Edw. VII. ch. 48, sec. 14, which, after the word "gain," inserts the words "and proprietary clubs which"—giving a definition of the expression "proprietary club." The board amended their by-law on the 9th June, 1908, by adding the provision already copied respecting proprietary clubs.

The Act of 1908 did not at all take away from the full effect of the Act of 1903—all those persons, natural or artificial, who were subject to control by the existing legislation, remained so subject after the Act of 1908. The Act of 1908, recognising that all those who for hire or gain kept such tables were thus subject, added another class which should be subject as well, even though this new class so added did not keep the table for hire or gain.

Most of what has been said as to the other stated case is applicable to this case also.

We have not before us anything to shew a finding by the police magistrate that these defendants did so keep or have the tables for hire or gain. I think, therefore, we should remit this case to the police magistrate (see sec. 765) with our opinion (setting aside the acquittal in the meantime), and allow the police magistrate to pass upon the question which has already been mentioned.

If the defendants did for hire or gain keep or have the billiard tables, there should be a conviction.

The defendants should also pay the costs of this case stated.

I should add that I have not looked at the evidence. The police magistrate has made the evidence a part of the case—that he should not have done. The Act is precise that he should “sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned;” then our duty is to determine the “questions of law arising thereon.” We should have nothing before us but the facts and the grounds aforesaid.

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Criminal Law—Intoxicating Liquors—Liquor License Act—Selling Liquor without a License—Second Offence—Adjournments—Regularity of—Justice Appointed High Constable—Right to Act as Justice—Habeas Corpus—Appeal—Forum—Costs.

The conviction of the defendant for a second offence under the Liquor License Act, R.S.O. 1897, ch. 245, was alleged to be illegal, by reason of the invalidity of certain adjournments made during the progress of the case, namely: (1) adjournments made by the justice before whom the information was laid, prior to the trial before the police magistrate; and (2) adjournments made after the trial had been entered upon, by a justice who had been appointed high constable of the county, and who, moreover, had no connection with the case:—

Held, that the adjournments first referred to were valid under sec. 702 of the Criminal Code—made applicable by R.S.O. 1897, ch. 90—which empowers the justice who took the information to do “all other acts and matters necessary preliminary to the hearing,” for the hearing must be deemed to refer to the actual hearing or trial of the case; but as to the adjournments secondly referred to it was doubtful whether the justice could legally act as such, and, even if he could, he had no jurisdiction to intervene in the case and grant adjournments. In any event, however, the alleged defects were merely irregularities, which were waived by the defendant appearing before the police magistrate at the trial, stating his readiness to proceed, and submitting evidence on his own behalf.

An appeal from an order in Chambers refusing to discharge the defendant on *habeas corpus*, was dismissed; and costs of it were allowed to the Crown against the defendant, BRITTON, J., dissenting.

Quære, whether an appeal lay to a Divisional Court; or whether the appeal might be referred to the Court of Appeal, the Attorney-General having refused a certificate under sec. 121 of R.S.O. 1897, ch. 245; or whether, in any event, the Divisional Court was bound, at the defendant's request, to direct the issue of a new writ of *habeas corpus*.

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THIS was an appeal by the prisoner to a Divisional Court from the judgment of Latchford, J., delivered on April 6th, 1909, refusing to discharge the prisoner from custody, upon the return of a writ of *habeas corpus* and a writ of *certiorari* issued in aid thereof.

The defendant was convicted by Peter Ellis, Esquire, police magistrate for the county of York, for a second offence of selling liquor without a license, contrary to the provisions of the Liquor License Act, R.S.O. 1897, ch. 245, and sentenced to four months' imprisonment.

The grounds on which the discharge of the defendant was moved for were that the conviction was illegal by reason of the invalidity of certain adjournments made during the progress of the case, and which are set out in the judgment, namely, (1) adjournments said to have been made, prior to the trial of the case before the police magistrate, by John H. Sanderson, the justice of the peace before whom the information was laid; and (2) adjournments made, after the trial had been entered upon, by John A. Ramsden, in the alleged capacity of a justice of the peace, the said Ramsden having, it was alleged, ceased to be such justice by reason of his appointment as high constable of the county of York; and further, that the said Ramsden had no jurisdiction to intervene in the case and grant adjournments.

On May 17th, 1909, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. B. Mackenzie, for the appellant.

E. Bayly, K.C., for the Crown, took the preliminary objection that no appeal lay to a Divisional Court; that under sec. 121 of the Liquor License Act, R.S.O. 1897, ch. 245, taken in connection with sec. 6 of the Habeas Corpus Act, R.S.O. 1897, ch. 83, the only appeal was to the Court of Appeal, for which the certificate of the Attorney-General must be obtained, but which was refused here.

Mackenzie, contra. The appeal was properly brought; but if the Court should hold that there is no right of appeal, then it should itself direct the issue of a writ of *habeas corpus*. The defendant is entitled to the writ from every Judge and Court.

The Court directed that the argument should proceed subject to the objection.

Mackenzie then proceeded with the argument. There was no power in the justice who took the information to grant adjournments. Section 95 of ch. 245 provides that all informations or complaints for the prosecution of an offence, etc., shall be laid within thirty days after the commission of the offence, and not afterwards, before any justice of the peace. All that the justice can do is to take the information. The prosecution of the offence, which includes all acts subsequent to the information, must be before two justices or a police magistrate, and they alone have the power to grant adjournments: *Anderson's Law Dic.*, p. 838, tit. "Prosecute;" *Abbott's Law Dic.*, vol. 2, p. 341, tit. "Prosecution;" *Words and Phrases Judicially Defined*, vol. 6, p. 5734, tit. "Prosecute;" *State v. Hardenburgh* (1808), 2 N.J. Law 257, 261. Section 708 of the Criminal Code does not apply. No doubt under R.S.O. 1897, ch. 90, the provisions of the Code are made applicable, but only so far as they are not inconsistent with the special Act. If sec. 708 empowers one justice to grant adjournments, then it is inconsistent with sec. 95 and does not apply. The power conferred by sec. 708 to do all acts necessary preliminary to the hearing, refers to acts done subsequent to the laying of the information, for "the hearing" includes all such subsequent acts. Ramsden, in addition to the reasons already stated, was precluded from acting as being in no way connected with the case. Section 722 refers to the justice who is entitled to deal with the case. His appointment as high constable also debarred him from acting. There being no valid adjournments, the information became nugatory, and, the thirty days having elapsed, the police magistrate had no jurisdiction to try the case and convict the defendant: *Rex v. Bowman* (1834), 6 C. & P. 337; *Regina v. Lennox* (1873), 34 U.C.R. 28; *Regina v. French* (1887), 13 O.R. 80; *Regina v. Walker* (1887), 13 O.R. 83; *The Queen v. Mayor, etc., of Bangor* (1886), 18 Q.B.D. 349, 361; *The Queen v. West*, [1898] 1 Q.B. 174; Act Respecting Constables, R.S.O. 1897, ch. 99, sec. 4; Dalton's Office of Sheriff, p. 371; *Rex v. Leach* (1908), 17 O.L.R. 643; *The Queen v. Payn* (1864), 34 L.J.N.S. Q.B. 59, 60; *Rex v. Bellamy* (1823), 2 D. & R. 727. The defendant by appearing at the trial did not waive any of the defects. Waiver does not confer jurisdiction: *Rex v. Nurse* (1904), 7 O.L.R. 418; *Regina v. French*, 13 O.R. 80; *Mander v. Falcke*, [1891] 3 Ch.

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Bayly, K.C., for the Crown. The adjournments were properly made. They were acts necessary preliminary to the hearing. The hearing refers to the actual trial; they were therefore authorized by sec. 708 of the Code. The fact of Ramsden being appointed high constable did not debar him from acting. The case of a sheriff or person occupying a like position is quite different. The alleged defects, however, were irregularities merely, which were waived by the defendant appearing at the trial and pleading to the charge. The magistrate had jurisdiction to try the charge: *Regina v. Hazen* (1893), 20 A.R. 633; *Regina v. Hughes* (1879), 4 Q.B.D. 614; *Rex v. Lowery* (1907), 15 O.L.R. 182; *Regina v. Brown* (1888), 16 O.R. 41.

June 3. FALCONBRIDGE, C.J.:—I have read all the cases cited by counsel at the argument, as well as those to which my attention has been called from time to time up to yesterday. An objectionable practice is growing up of sending in memoranda of authorities after the argument without any special leave and without reference to the opposite party.

However, this case involves the liberty of the subject, and everything submitted for our consideration has been considered, which has involved much delay in giving judgment.

I agree with my brothers in dismissing the motion.

Applications are being constantly made, on purely technical grounds, on behalf of persons clearly guilty of the offences for which they have been convicted. It is their right, and the right of counsel, to make these applications. But they should, if found to be baseless, be subject to the usual penalty of costs.

The motion will be accordingly dismissed with costs.

BRITTON, J.:—The proceedings in this case are set out in full by my brother Riddell, and the question is whether upon the facts we are able to distinguish it from *Regina v. Hazen*, 20 A.R. 633. In that case there had been an adjournment for more than eight days, contrary to the section of the Code, then sec. 857, and it was held by the Court that the subsequent appearance by the defendant waived any objection that otherwise might have been taken.

The language of Mr. Justice Osler, at p. 644, is as follows: "This, I think, was a mere matter of procedure, and the defendant having so appeared and continued the proceedings, the conviction is not vitiated by the fact of the delay having been for a longer period than the Act authorized. It is apparent that the inquiry on the 3rd September related to the charges mentioned in the information, which were the subject of the first hearing, and if, as is now well settled, the appearance before justices and allowing a charge to be proceeded with without objection will, as a general rule, waive the want of an information or summons, the appearance upon an adjournment, even though an irregular adjournment, of a hearing commenced by information and summons must *â fortiori* be a waiver of objections to the irregularity."

It does not appear that *Rex v. Bowman*, 6 C. & P. 337, now cited by Mr. Mackenzie, was cited upon the argument in *Regina v. Hazen*.

In *Rex v. Bowman* there was an adjournment of the sessions from Monday the 1st July till Tuesday the 2nd, but no adjournment on Tuesday. On Thursday the 4th July the Court re-assembled, and adjourned to Friday the 5th, when the prisoner was tried and convicted. It was held that, by reason of the want of an adjournment from Tuesday to Thursday, the proceedings on Friday were *coram non judice*, and therefore a nullity.

In *Dixon v. Wells* (1890), 25 Q.B.D. 249, a complaint having been made to two justices for an offence under the Acts respecting adulteration of food, a summons was signed by another justice, who had not heard the complaint. The appellant appeared, and objected that the summons was invalid and that the magistrate had no jurisdiction to hear the case. The magistrate thought the defect, if any, in the summons was cured by the appellant's appearance, and he heard the case, and convicted. Held, that the summons, having been signed and issued by a justice who had not heard the complaint, was invalid, and that the defect was not cured by the appearance of the appellant, *as he appeared under protest*.

In the case last mentioned *Regina v. Hughes*, 4 Q.B.D. 614, was cited. In that case a police constable procured a warrant to be illegally issued, without a written information or oath, for the arrest of a person for assaulting the constable in the dis-

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charge of his duty. Upon that warrant the person charged was brought before justices, and was, without objection, tried and convicted. *Held*, that he was rightly convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction, though the warrant was illegal.

In dealing with that case in *Dixon v. Wells*, Lord Coleridge said, 25 Q.B.D., at p. 255: "In all the cases to which our attention has been called there was no protest made by the person who appeared, and the Courts said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. They are mere irregularities, and if one who may insist on them waives them, submits to the judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time."

Here the defendant was in fact charged with an offence. Pursuant to that charge he was in court before a police magistrate having jurisdiction generally to try such a case. There was an adjournment by the police magistrate without objection of the accused. The accused appeared pursuant to adjournments and without objection took his trial.

Upon the authorities I do not feel at liberty to go behind what was done with the consent of the accused in a court of competent jurisdiction. The information was laid within the time. The accused appeared for trial, not objecting but submitting to the jurisdiction which the police magistrate had, waiving all defects, if any, in mere matters of procedure, necessary to compel the attendance of the accused, had he objected: *In re Maltby* (1881), 7 Q.B.D. 18; *Regina v. Clarke* (1891), 20 O.R. 642.

So far I have assumed that no objection to the jurisdiction of police magistrate Ellis could be urged, other than those mentioned above.

In this case, as the initiatory proceedings were not taken before the police magistrate, two justices could have proceeded to try the defendant; that would not, however, of itself, oust the jurisdiction of the police magistrate, and, so far as appears in this case, he (Ellis), under secs. 27 and 30 of the R.S.O. 1897, ch. 87, had jurisdiction.

I have read the cases cited by Mr. Mackenzie, and I wholly

agree that, had the objection taken on this motion been taken to the jurisdiction, instead of the accused waiving all, and standing his trial, he could not have been legally convicted.

I am unable to distinguish *Regina v. Hazen*, 20 A.R. 633, so would dismiss the motion, but without costs.

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RIDDELL, J.:—An information charging the defendant with a second offence against the Liquor License Act, alleged to have been committed on the 25th September, 1908, was laid on the 21st October, 1908, before John H. Sanderson, J.P. It does not appear if summons issued; presumably it did. On the 14th November the case was called before Mr. Sanderson, and, by consent of both parties, was adjourned till the 21st November. Upon that day the case stood with the like consent till the 28th November; then with the like consent till the 30th November; then, at the request of the defendant, till the 7th December; then, by consent of both parties, till the 12th December; then, at request of the defendant, till the 14th December. All this was before Mr. Sanderson, Mr. Ellis, the police magistrate, being absent from home, it is said. On the 12th December Mr. Ellis adjourned the hearing till the 17th December, at the request of the prosecutor. On the 17th December he adjourned it till the 21st December; on the 21st till the 28th; then till the 4th January, and then till the 7th January. On the 7th January, 1909, the defendant pleaded not guilty, and said he was ready to go on. Evidence was taken, and the witnesses cross-examined by counsel for the defendant. An adjournment was then had until the 15th January. On that day, at the request of the defendant's counsel, in the absence of the defendant, an adjournment was had till the 22nd January. Upon that day a further adjournment till the 29th January, and then till the 5th February. These last two adjournments were made by Mr. Ramsden—it does not appear at whose request—but admittedly they were without objection. On the 5th February, before Mr. Ellis, police magistrate, the defendant asked for and obtained an adjournment till the 12th February. On the 12th February, before Mr. Ellis, the defendant produced witnesses, who were examined and cross-examined, and, after argument, the defendant was found guilty and sentenced to imprisonment for four months.

On the 24th March writs of *habeas corpus* and *certiorari* in aid

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were issued. An application for the discharge of the prisoner was refused by Mr. Justice Latchford on the 6th April. The defendant now appeals to the Divisional Court.

Objection was taken to the right of appeal to this Court, and it was urged that, as the Attorney-General had refused his certificate, under R.S.O. 1897, ch. 245, sec. 121, we could not send this appeal to the Court of Appeal. Mr. Mackenzie then urged that if no appeal lay, we should grant him a new writ of *habeas corpus*.

In the view I take of the case I do not think it necessary to decide the right to appeal, or to move for a new writ, as I think the application fails upon the merits.

The objections of the defendant are substantially two: (1) Mr. Sanderson had no right to grant any enlargements as he did before the case was entered upon; and (2) Mr. Ramsden had no right to grant any enlargements after the case had been entered upon.

As to the first ground of objection, I do not think it tenable. The R.S.O. 1897, ch. 90, makes applicable the provisions of the Criminal Code. Section 708 of the Code enables the justice who receives the information (if no other) not only to grant a summons, but also "to do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more justices." While in one sense the appearing of an accused before a magistrate and the enlarging by the magistrate may be part of the "hearing," I do not think that that is so in the sense of the word "hearing" in this section. Such an enlargement is rather "before the hearing," as set out in sec. 722, and the "hearing" cannot, in my view, begin before the accused has been called upon to plead.

The further answer to this objection will appear in the consideration of the second.

(2) It seems doubtful whether Ramsden was a justice of the peace at all: and even if he was, I do not think he had any right to act. Section 722 gives "the justice" the power to adjourn. This must mean the justice who is trying, and not some outsider. Ramsden's acts were wholly unauthorized; and had the defendant insisted upon the disposal of his case or refused to attend a further hearing there might have been trouble.

But he does not object; on the contrary, he attends, and produces evidence; he "appears . . . and takes his trial and his chance of acquittal," and that constitutes a waiver of all irregularities: *Regina v. Hazen*, 20 A.R. 633; *Regina v. Heffernan* (1887), 13 O.R. 616. That all matters as to adjournments are matters of irregularity is well decided.

This is, of course, an answer to the first question as well. No doubt waiver cannot give jurisdiction; but here, after an information had been laid within thirty days of the alleged offence, the jurisdiction of the police magistrate attached, and no irregularity as to adjournments deprived him of jurisdiction absolutely.

The motion should be refused with costs.

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[DIVISIONAL COURT.]

CONNOR-RUDDY CO. v. ROBINSON-WHYTE CO.

License—Privilege of Posting Bills on Walls—Contract—Construction—Seal—Sale of Premises—Revocation of License—Contract by Grantee with another Bill Poster—Damages.

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June 22.

An agreement was entered into between the owner of a house and the plaintiffs, an advertising company, whereby the owner, therein called the lessor, agreed to sell, and the plaintiffs, called the lessees, agreed to take, for a term of five years, all the advertising privileges on a wall of the house, at the yearly rental of \$5, with the right of cancellation to the lessees on one month's notice, should the location become valueless for advertising purposes, either from buildings or other causes. The document was not sealed, but the word "seal" was printed opposite the owner's signature. The plaintiffs painted an advertisement on one of the walls. In 1908 the owner sold the house, giving the purchaser a conveyance thereof and stating that the plaintiffs' right was merely from year to year, and that the rent was paid up to January, 1909, when the plaintiffs' rights ceased. The purchaser, after January, 1909, made a contract with the defendants, another advertising firm, for the right to paint on the wall, and they, thereupon, painted out the plaintiffs' advertisement, painting thereon one of their own, which the plaintiffs painted out, repainting their own, and brought an action against the defendants for damages, etc.:

Held, that the action was not maintainable; that the agreement made with the plaintiffs amounted merely to a revocable license, which was revoked by the sale and conveyance to the purchaser.

Kerrison v. Smith, [1897] 2 Q.B. 445, followed.

Wood v. Leadbitter (1845), 13 M. & W. 838, *Lowe v. Adams*, [1901] 2 Ch. 598, and *London County Council v. Dundas*, [1904] P. 1, referred to and discussed.

Quære, whether an acknowledgment by the purchaser of the plaintiffs' rights would enable an action to be brought against her.

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THIS was an appeal by the plaintiffs from the judgment of the county court of the county of York.

The plaintiffs, who were engaged in what they called the outdoor display advertising business, in the city of Toronto, the defendants being engaged in the same business, alleged that on the 7th January, 1908, they procured a lease from Mrs. H. M. Walker, the owner of the building No. 718 Bathurst street in the city, of all the advertising privileges on the north wall of the house, for a term of five years, at a yearly rental of \$5, and by virtue thereof they had occupied the said north wall with an advertisement painted by them thereon of "Quaker Oats," and that they continued to so occupy the wall until the 9th January, 1909, when the defendants wrongfully trespassed on the wall and painted out the plaintiffs' advertisement and painted thereon an advertisement of their own, which the plaintiffs were compelled to paint out, and to repaint thereon their own advertisement. The plaintiffs claimed damages.

The defendants set up that the house in question had been purchased from Mrs. Walker by a Mrs. Inglis, without notice, free from incumbrances, leases, liens, licenses, or claims of any kind thereon; and that under an agreement made on the 9th January, 1909, with Mrs. Inglis, the defendants became licensees of the north wall for their advertising signs and outdoor display painting, at the annual rental of \$5, with an option of renewal; that, in pursuance of their rights under the agreement, they painted out the plaintiffs' advertisement, painting thereon an advertisement of their own, the advertisement being of a beverage called "Coca Cola." They alleged that the plaintiffs by their said acts were trespassers, and had acted illegally. They further alleged that the plaintiffs' right was only for a year, which had expired; and that, in any event, the plaintiffs were mere licensees, and that by the sale to Mrs. Inglis their license had been revoked.

The trial took place before Morgan, junior county Judge.

The additional facts, so far as material, are set out in the judgment.

The learned Judge found in favour of the defendants, dismissing the plaintiffs' action with costs.

From this judgment the plaintiffs appealed to a Divisional Court.

On June 17, 1909, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

H. J. Martin, for the appellant. The document here constituted a valid lease. A lease may be created by an agreement to allow a person to occupy a piece of land for a definite term. Here was the right to use the wall for five years, at an annual rental. It constituted a grant of an incorporeal hereditament. In any event it was a license coupled with an interest, and was irrevocable: *Walsh v. Lonsdale* (1882), 21 Ch.D. 9; *Lowe v. Adams*, [1901] 2 Ch. 598; *Hooper v. Clarke* (1867), L.R. 2 Q.B. 200; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, 98; *Wood v. Manley* (1839), 11 A. & E. 34; Gale on Easements, 8th ed., pp. 2-4, 49. The purchaser had notice of the plaintiffs' rights and acquiesced in them. She had notice of the lease, and this constituted notice of its contents: *Patman v. Harland* (1881), 17 Ch. D. 353. Even if the lease were revocable, an action will lie for obstructing the plaintiffs in the use of the wall: *Kerrison v. Smith*, [1897] 2 Q.B. 445, distinguishing *Wood v. Leadbitter* (1845), 13 M. & W. 838. The lease did not require to be registered, as it did not exceed seven years: Registry Act, R.S.O. 1897, ch. 136, sec. 39.

C. A. Moss, for the respondent. This was not a grant of an incorporeal hereditament. To constitute an incorporeal hereditament there must be a right issuing out of the land, and it must be by deed. There was no seal here, for, although the word seal is printed opposite the grantor's name, there was in fact no seal. The plaintiffs merely had a license, and no interest passed to them, and it was revocable; and, even if they had an interest, it was still revocable; and it was revoked by the sale and conveyance to Mrs. Inglis. The plaintiffs also paid no rent for the year 1908, and this gave Walker the right to terminate the holding. It is a very different case from the grant of fishing or shooting rights, where something is taken out of the land, namely, fish or game: Foa on Landlord and Tenant, 4th e.l., pp. 6-7; *Heap v. Hartley* (1889), 42 Ch.D. 461; *Wilson v. Tavener*, [1901] 1 Ch. 578; Cyc., vol. 25, tit. "Licenses," p. 645. Whatever may be the liability as between the plaintiffs and Mrs. Inglis, it does not, of course, affect the defendants.

Martin, in reply. An incorporeal hereditament includes, amongst other things, ways and offices, and in neither of these

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is there anything taken out of the land. The plaintiffs had the right to go on the wall and paint there, and had exclusive possession of the wall for this purpose. A seal was not essential.

June 22. RIDDELL, J.:—Mrs. Mary Walker, being the owner of 718 Bathurst street, Toronto, signed an agreement with the plaintiffs in the following terms:—

“Advertising Privilege.

“Connor-Ruddy Co., Limited.

“141 Confederation Life Building,

“Toronto.

“Agreement made at Toronto, seventh day of January, 1906, between Mrs. H. M. Walker, of the city of Toronto, hereinafter called the lessor, and the Connor-Ruddy Co., Limited, hereinafter called the lessee.

“The lessor agrees to rent and the lessee agrees to take for a term of five years all advertising privileges on wall of 718 Bathurst, at a rental of five dollars per annum, payable yearly in advance. Her privilege sign.

“Should the lessee, at any time, deem this location valueless for advertising purposes, either from building or other cause, they may cancel this lease on one month’s notice.

“(Name) MRS. H. M. WALKER,

“(Address) 718 Bathurst.

“Central wall.

SEAL.”

The “seal” is simply a printed open oblong, with the word “seal” printed therein.

Mrs. Walker says that she understood this to be only from year to year, but I do not think anything turns upon that fact, if it be a fact.

In July, 1907, she sold to Mrs. Inglis, telling the purchaser that the plaintiffs had the wall from year to year; that they had paid up to January, 1908, and upon the expiration of that year their right to the wall ceased. “She asked about the wall, and I says, when the year is up, the wall is not rented.”

On the 9th January, 1909, Mrs. Inglis made a contract with the defendants for advertising privileges, and the defendants painted

out the plaintiffs' advertisement and painted in their own. The plaintiffs bring action to restrain the defendants and for damages.

Although in the document first mentioned the parties call themselves lessor and lessee, this is simply a dictionary for the particular document; and this does not affect or change their legal relationship. They are not landlord and tenant. If they were, the provisions of the Registry Act, R.S.O. 1897 ch. 136, sec. 39, would be effective to protect the plaintiffs, even in the absence of notice to Mrs. Inglis.

But the authorities which we should in this Court follow make it clear that the transaction is but a license.

In *Kerrison v. Smith*, [1897] 2 Q.B. 445, the plaintiff and defendant agreed orally that the defendant should let his wall to the plaintiff for bill posting, the plaintiff to erect the hoarding. The plaintiff did erect the hoarding, posted bills, and made several payments. The defendant gave notice to the plaintiff that the hoarding must be removed, and nearly a month later the defendant took it down. The Court held that damages might be recovered for breach of contract; but expressed no doubt that all the plaintiff had was a license, and that it could be revoked.

Wood v. Leadbitter, 13 M. & W. 838, the leading case, has never been overruled, though Cozens-Hardy, J., in *Lowe v. Adams*, [1901] 2 Ch. 598, at p. 600, throws some doubt upon it. This is, however, *obiter*, and there are many cases in which the leading case has been approved. The latest I have seen is *London County Council v. Dundas*, [1904] P. 1, at p. 32.

This license, then, is revocable; and, moreover, it is personal to the licensor, and is determined by the grant by her to Mrs. Inglis.

In *Wallis v. Harrison* (1838), 4 M. & W. 538, the defendants claimed that they had full liberty, license, etc., to enter upon certain lands by an agreement with the Dean and Chapter of Durham, the plaintiff having acquired the property from the Dean and Chapter. It was held that the defendants were trespassers, immediately after the transfer, if they entered upon the property, and this without notice of the transfer. "A person is bound to know who is the owner of the land upon which he does that which, *prima facie*, is a trespass:" *per* Lord Abinger, C.B., at p. 543. See also *Coleman v. Foster* (1856), 1 H. & N. 37.

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The plaintiffs lost all right to the use of the wall they might have had and did have, forthwith upon the conveyance to Mrs. Inglis; and, consequently, they have no right of action against these defendants. Nor is their case advanced against these defendants if the fact be, as contended for, that the landlady, Mrs. Inglis, acknowledged their rights. They do not become any more than licensees, and the license may be revoked, as it was upon the contract being made with the defendants. Whether they have an action against Mrs. Inglis, is not here the question.

I do not pursue inquiry as to the result if this were the grant of an incorporeal hereditament; it is not an incorporeal hereditament at all, and, if it could be such, it could only be conveyed by an instrument under seal: *Wood v. Leadbitter, supra*, at p. 854.

This is not an instrument under seal: *Clement v. Donaldson* (1851), 9 U.C.R. 299; *Adam v. Kerr* (1798), 1 B. & P. 360; *Thompson v. Skill* (1909), 13 O.W.R. 887.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

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[DIVISIONAL COURT.]

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Jan. 6.
Feb. 13.

Pleading—Application to Strike out under Con. Rule 261—Reasonable Cause of Action—Nonjoinder of Necessary Party—Application to Stay Proceedings for—Con. Rule 206, Scope of—Discretion of Court under—Municipal Corporation—Hydro-Electric Power Commission Acts—Refusal of Fiat by Attorney-General—7 Edw. VII. ch. 19, sec. 23 (O.)—Right of Appeal from Chambers Order—Con. Rule 1278.

The plaintiff, a ratepayer of a city corporation, brought an action against the corporation to have declared void a contract entered into between the corporation and the Hydro-Electric Power Commission of Ontario, for the supply of electrical power to the inhabitants of the city, and in his statement of claim alleged that the contract could be validly entered into by the corporation only with the assent of the electors, and that there was a material variation between the contract attacked and that set forth in the by-law which had been approved by the electors, inasmuch as the latter contained a limitation as to the price at which the power was to be supplied, which was not contained in the contract proposed to be entered into between the defendants and the Commission. The statutes by which the Commission was appointed provided that no action should be brought against it or any of its members without the consent of the Attorney-General, who refused to grant the plaintiff's application for a fiat permitting the joinder of the Commission as a defendant. The defendants having moved under Con. Rule 261 for an order that the statement of claim should be struck out, on the ground that it disclosed no reasonable cause of action, and for an order staying all proceedings until the Commission should be added as a defendant:—

Held, that, as the statement of claim appeared to disclose a substantial cause of action (see *Scott v. Patterson* (1908), 17 O.L.R. 270), it should not be struck out under the Rule in question, which applies only to pleadings which are obviously unsustainable, or to cases in which the Court is satisfied that a statement of claim discloses no cause of action at all.

Held, further, that, even assuming the existence of a contract binding upon the corporation and the Commission, the Court should not, in the exercise of the discretion vested in it under Con. Rule 206, stay the action until the Commission should be added as a co-defendant, inasmuch as the plaintiff had done all in his power to have it so added, having applied to the Attorney-General for a fiat permitting such joinder, which application had been strenuously opposed by the defendants, and refused.

Con. Rule 206(1), which provides that "an action shall not be defeated by reason of the misjoinder of parties," applies also to nonjoinder, which is expressly included in the corresponding English Rule, and the authorities upon the latter are therefore applicable in our Courts.

Carter v. Clarkson (1893), 15 P.R. 379, at p. 380, approved.

Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co. (1880), 27 Gr. 592, and *Jones v. Imperial Bank of Canada* (1876), 23 Gr. 262, distinguished.

Discussion of the principles upon which the Court will act in the exercise of its discretion in ordering, or refusing to order, the joinder as defendant of a person who ought under ordinary circumstances to be so joined, and of the cases bearing upon the subject.

Seem, that, as the defendants' application should, under the practice, have been made before a Judge in Chambers, it was open to doubt whether they could have maintained their appeal to a Divisional Court without special leave under Con. Rule 1278.

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IN these actions, in which the issues were substantially the same, a motion was made in each case by the defendants, under Con. Rule 261, for an order that the statement of claim be struck out, on the ground that it disclosed no reasonable cause of action, and that the action was frivolous and vexatious, and for an order staying all proceedings until the Hydro-Electric Power Commission of Ontario be added as a party defendant. The facts are fully set out in the judgments.

The motions were argued before LATCHFORD, J., in the Weekly Court, on the 21st December, 1908.

J. S. Fullerton, K.C., for the defendants the city of Toronto.

E. F. B. Johnston, K.C., and *H. O'Brien*, K.C., for the plaintiff Beardmore.

E. E. A. DuVernet, K.C., and *A. H. F. Lefroy*, K.C., for the defendants the city of London.

J. M. McEvoy, for the plaintiff Smith.

The following is the judgment of LATCHFORD, J., in the Beardmore case, dismissing the defendants' motion with costs. The motion in the Smith case was dismissed at the same time, for the same reasons.

January 6. LATCHFORD, J.:—The action is brought by Walter D. Beardmore, a freeholder and ratepayer of the city of Toronto, suing on behalf of himself and all other ratepayers of the city of Toronto, against the corporation of the city of Toronto, for a declaration that a certain contract made between the defendants and the Hydro-Electric Power Commission of Ontario is void, and for an injunction restraining the defendants from acting upon said contract.

The Hydro-Electric Power Commission was appointed by the Lieutenant-Governor in council under the provisions of 6 Edw. VII. ch. 15 (O.). Two of the three members may be members, and one must be a member, of the Executive Council of Ontario. By the statute mentioned and 7 Edw. VII. ch. 19 (O.), large powers, contractual and otherwise, may be exercised by the Commission upon the authorization of the Lieutenant-Governor in council.

Section 21 of the Act of 1906 provides that "no action shall be brought against the Commission . . . without the consent of

the Attorney-General for Ontario." The Act of 1907, 7 Edw. VII. ch. 19, sec. 23, contains the same provision in a slightly different form.

After setting forth the status of the parties—the plaintiff being a freeholder and ratepayer of the city of Toronto, and the defendants a municipal corporation acting through the municipal council thereof—the statement of claim alleges that by virtue of ch. 15 of 6 Edw. VII. the Hydro-Electric Power Commission of Ontario was brought into existence; that the defendants, in pursuance of said Act, submitted a certain by-law to the people, and, after the vote thereon, finally passed such by-law, as No. 4834, on the 28th January, 1907.

Paragraph 6 of the statement of claim is as follows: "The said by-law No. 4834 enacted, among other things, that it shall be lawful for the said municipal corporation to enter into a contract with the Hydro-Electric Power Commission of Ontario for the supply to the said corporation, for 30 years, of 15,000 continuous horse power or more of electrical power or energy for the uses of the municipal corporation and the inhabitants thereof, for lighting, heating, and power purposes, at from \$14 to \$18.10 per horse power per annum for the continuous power, ready to be distributed by the said municipal corporation, such price to include all charges for interest, sinking fund, for cost to construct, and the cost to operate, maintain, repair, renew, and insure the plant, machinery, and appliances to be used by said Commission."

The statement of claim further alleges that, purporting to act in pursuance of the said by-law, the defendants authorized their mayor and clerk, by by-law No. 5138, to execute a contract, and such officers did execute a contract with the Hydro-Electric Power Commission, for 10,000 horse power at Niagara Falls, at a price dependent on voltage, and, if voltage over 60,000, the price to be fixed by arbitration.

This contract, the plaintiff states, was not authorized by by-law No. 4834, in that there is nothing in the contract limiting the liability of the defendants to a sum not exceeding \$18.10 per horse power, for continuous power ready for distribution, and the defendants might be bound to take power at a price considerably in excess of the maximum price, \$18.10, fixed by the by-law. The plaintiff also asserted that the contract he impeached was not only un-

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authorized by the ratepayers of Toronto, but was induced by representations of the chairman of the Commission, and those acting under him, which were untrue in substance and in fact. A charge of misrepresentation and fraud on the part of the Commission was also made.

After the motion had been partially argued, I directed that it should be enlarged until an application for the Attorney-General's consent had been granted or refused. The plaintiff applied to the acting Attorney-General, Sir James P. Whitney. The application is stated by Mr. Johnston, who represented the plaintiff, to have been opposed by counsel for the defendants and counsel for the Hydro-Electric Power Commission. The plaintiff in a similar action—*Smith v. City of London*—made application for a fiat at the same time. After consideration the following decision was rendered:—

“*Smith v. London. Beardmore v. Toronto.*

“In re application for fiats in the above cases.

“These applications were fully argued before me by counsel representing the different interests on the 1st December.

“I am expected, apparently on the mere statement of a plaintiff, that the members of the Hydro-Electric Power Commission were guilty of fraud and deception, as set out in the statements of claim, to assume the truth of the statement, and, therefore, grant a fiat. Under this doctrine it would be simply necessary for a plaintiff to interject into his pleading any allegation calculated, if true, to justify the issue of a fiat, and a fiat would follow as a matter of course. As I cannot agree with this, and as under such circumstances fiats have been many times refused, I do not see my way clear to grant these applications.

“Apart from the question of fraud, the plaintiff's contention in each case rests upon the view that the municipal council had not the power under the statute to finally enter into contracts with the Hydro-Electric Power Commission without submitting the terms of them to the ratepayers. I have personal knowledge that this was not the intention of the Legislature, and I cannot divest myself of that knowledge. It may be that at its next session, which cannot now be long delayed, the Legislature may make a declaration on the subject.

"In refusing the applications now, I reserve leave to the applicants to renew them after the opening of the session.

"J. P. Whitney,
"Acting Attorney-General."

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Upon the renewal of the motion, after the consent had been refused, leave was asked to amend the statement of claim by withdrawing the paragraphs alleging misrepresentation and fraud, and substituting therefor the following paragraphs:—

"9. The ratepayers of the said city of Toronto having passed the said by-law for the supply of electric power at a maximum price of \$18.10 per horse power per annum ready for distribution, it became the duty of the members of the municipal council of the corporation of the city of Toronto to see that no other or different contract was signed under the authority of the said by-law.

"10. The plaintiff further says that the defendants are not authorized, and have no power, to enter into the said contract.

"11. The defendants allege that the Crown is concerned in the matters above referred to, and that the Crown is a necessary party to these proceedings, but the plaintiff submits that the said by-laws, and any contract made or pretended to be made thereunder, are not matters of Crown prerogative, and that the Crown is not therefore a necessary or proper party to this action.

"12. The plaintiff further says that the defendants claim that no action can be brought against the Hydro-Electric Commission of Ontario in respect of matters in which the Commission is concerned, without the fiat of the Attorney-General of the Province of Ontario, by reason of the statutory provision in that behalf, being 7 Edw. VII. ch. 19, sec. 23, but the plaintiff submits that the said provision is *ultra vires* of the Legislature of the Province of Ontario."

The plaintiff concludes by asking a declaration that 7 Edw. VII. ch. 19, sec. 23, is *ultra vires* of the Legislature of Ontario, and that the contract is illegal and void, and for an injunction restraining the defendants from acting upon the contract, levying taxes or paying moneys in pursuance of the contract, and from delivering the contract to the Hydro-Electric Commission.

On behalf of the defendants it is contended that even as amended the statement of claim should be struck out.

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Under Con. Rule 261, a Judge of the High Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action, or ground of defence, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just.

The Rule applies only where the entire pleading discloses no reasonable cause of action or ground of defence: *Smith v. Traders Bank* (1905), 11 O.L.R. 24, at p. 29.

The two parts of the Rule are distinct: *Shafto v. Bolckow, Vaughan, & Co.* (1887), 34 Ch.D. 725. The summary proceeding under the first part can only be adopted when it can be clearly seen that the claim or answer is on the face of it "obviously unsustainable:" *Attorney-General of the Duchy of Lancaster v. London and North Western R.W. Co.*, [1892] 3 Ch. 274 (C.A.); or in cases which are plain and obvious: *Hubbuck v. Wilkinson*, [1899] 1 Q.B. 86. Before a claim or answer is struck out under this Rule it must be seen that it is not only demurrable, but something worse: *Roberts v. Charing Cross, etc., R.W. Co.* (1903), 87 L.T.R. 732. The pleading will not be looked at with the eyes of an old special pleader: *Kellaway v. Bury* (1892), 66 L.T.R. 599 (C.A.) The question is not whether it discloses a good cause of action, but whether it discloses a reasonable one: *Dadswell v. Jacobs* (1887), 34 Ch.D. 278, at p. 281 (C.A.)

The cases cited shew that the Rule does not apply where there is a question of difficulty or important points of law to be determined, or where the transaction is a complicated one, giving rise to questions which ought to be tried.

The power to stay or dismiss an action under the second branch of the Rule is also used only in exceptional cases where the proceedings are clearly wanting in *bona fides*, and are vexatious or oppressive. "That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt:" Lindley, L.J., in *Kellaway v. Bury*, 66 L.T.R. 599, at p. 602. The pleading must not only be demurrable, but the Court must see that the plaintiff has no cause of action at all. In *Stephenson v. Garnett*, [1898] 1 Q.B. 677, in which a stay was granted, Chitty, L.J., declares that the jurisdiction of the Court to stay an action as frivolous and vexatious ought to be exercised with very great caution. The

ground of the decision in that case is that it would be an abuse of the process of the Court to allow a suitor to litigate over again the same question which has already been decided against him: p. 680.

In *Reichel v. Magrath* (1889), 14 App. Cas. 665, the defendant sought to retry the same issues that had been conclusively decided. Lord Herschell said of the defendant: "He has not a shadow of defence:" p. 669. In *Macdougall v. Knight* (1890), 25 Q.B.D. 1, the question raised was identical with that previously decided by a Court of competent jurisdiction. The rule was applied by our own Court in *Lawry v. Tuckett-Lawry* (1901), 2 O.L.R. 162, but in that case the judgment of the Court of Appeal in *Lellis v. Lambert* (1897), 24 A.R. 653, left nothing to be said in favour of the plaintiff's right to maintain the action. In *Kellaway v. Bury*, 66 L.T.R. at p. 602, Kay, L.J., says: "Before the Court will summarily dismiss an action either under the rule applicable to such a case as being frivolous or vexatious, or under the inherent jurisdiction which the Court has to prevent its process being abused, it will very cautiously and carefully consider the facts of the case."

In the present case a ratepayer, whose rights are unquestionably materially affected by the contract entered into between the defendants and the Hydro-Electric Power Commission, invokes the Court to declare whether that contract is or is not valid and binding upon himself and the other ratepayers of the city of Toronto; and, if the contract should be found invalid, to prohibit the defendants from incurring any liability under it which would affect him as a ratepayer. The contract on the important point of the cost of power is alleged by the statement of claim to differ from the price stated in the by-law approved by the ratepayers. I adopt, as applicable to this case, the language of Mr. Justice Anglin in a case arising out of a by-law of the town of Galt, reported as *Scott v. Patterson* (1908), 17 O.L.R. 270, at p. 276: "If the assent of the ratepayers to the contract (that must assuredly mean, to the material terms of the contract, and what term is more material in the present case than the price of the power delivered in the municipality?) is by the statute made a pre-requisite to the right of the municipality to enter into such contract, when that assent has not been obtained, the council has not the right to pass a by-law requiring the execution of such contract."

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It was also held in the Galt case that a by-law mentioned (as is this by-law 4834) in sec. 1 of 8 Edw. VII. ch. 22, was not validated by that statute, and that a contract similar to that sought to be impeached by Mr. Beardmore might be regarded as illegal and contrary to 6 Edw. VII. ch. 15 and 7 Edw. VII. ch. 19.

The importance of the matter to be determined is manifest. It was said at the hearing of the motion, and not disputed, that the contract involved the expenditure by the defendants of probably \$3,000,000. To meet this sum the plaintiff and other ratepayers will be assessed by the defendants, and taxes will be imposed and collected. He has, I consider, a status to maintain this action.

Although the issue presented is new and has never been determined, the validity of a similar contract has been questioned in the carefully considered judgment of Mr. Justice Anglin in *Scott v. Patterson*. It cannot be said that the plaintiff's action is "obviously unsustainable," except upon the ground that one of the parties to the contract attacked is not a party to the suit, and cannot be made a party to it by anything the plaintiff can do. Upon the authority of *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.* (1880), 27 Gr. 592, I am asked to hold that the plaintiff cannot maintain his action until the Hydro-Electric Commission has been made a party. That decision arose upon a demurrer. The action sought to restrain the defendants from carrying out an agreement for the transfer of messages to the American Union Telegraph Co. without making the latter company a party to the suit. Chancellor Spragge allowed the demurrer. In his judgment (p. 595) he says: "It does appear to me to be manifestly unjust, as well as contrary to the rule of procedure in this Court, as I understand it, to hear a cause and make a decree (if the decree be made as prayed for) which would disable these defendants from performing their agreement, which the plaintiffs themselves say the defendants have made with another company, and for all that appears in the bill made innocently and in perfect good faith on the part of that other company, without giving that other company an opportunity of shewing why this should not be done."

There is no rule of procedure now in force to the effect stated by the learned Chancellor, and a pleading will not now be looked at with the same strictness as it would have been under the old demurrer: *Dadswell v. Jacobs*, 34 Ch.D. at p. 281. Rule 202, on

the other hand, expressly enables the Court to adjudicate on matters arising "between parties, who are some only of those interested in the property in question . . . without making the other persons interested in the property . . . parties." If the Court can now adjudicate regarding property in the absence of a party interested, why cannot the Court do so in regard to a contract, especially when the plaintiff has exhausted all means of bringing in the party of whose absence the defendants complain? The general principle is undoubtedly that all parties interested in the subject matter of the suit should be before the Court. So far as this action concerns the contract itself, as distinguished from the right of the defendants to assess and tax the plaintiff and other ratepayers to meet the obligation of the defendants under the contract, there would be a lack of finality in a decision in favour of the plaintiff. The Hydro-Electric Commission would not be bound by a decision in a suit to which it was not a party. But it is not, I think, open to the Commission to complain when the plaintiff has done all that is within his power to make the Commission a party, and the Commission has resisted his efforts. Nor should the plaintiff be expected to wait until after the opening of the session for the consent of the Attorney-General. The decision of the acting Attorney-General refusing his consent is no more open to question by me here than the provision of the statute making such consent necessary, before a body empowered to enter into contractual obligations throughout Ontario can be proceeded against in the Courts of this Province, even in respect to breaches of such obligations.

It is argued that the enactment investing the Commission with immunity, except with the consent of a member of the same executive as one or possibly two members of the Commission, is beyond the powers of the Legislature of Ontario. I do not feel called upon to attempt to determine, upon a motion of this kind, whether such legislation, however extraordinary it may appear from a juristic point of view, is *ultra vires* or not. But I am asked to close the doors of the Court against a litigant who questions the power of the Legislature to free the Commission from the liability which would otherwise be cast upon it by the law. The ground of the decision in *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, apart from the rule mentioned, is the injustice of proceeding in the absence of one of the parties to the contract without giving that party an

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opportunity to be heard. The Hydro-Electric Commission has been given an opportunity to be heard in this action. It has objected to being made a party, and that objection has, after consideration, been sustained. The Commission cannot reasonably object if in its absence an opportunity is given to the plaintiff to have his rights determined, at least as between himself and the defendants, and possibly to the extent of declaring the contract with the Commission to be invalid. I regard the case of *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, and the cases therein cited, as inapplicable to the present case, and see in them no reason why the plaintiff should not be permitted to proceed with his action. He seeks a decision on difficult, important, and complicated questions, which, in my opinion, ought to be tried. If he should succeed, he may possibly not succeed to the same extent as if the Hydro-Electric Commission was a party, but for this he is in no way to blame; and as far as the Courts can give him relief, if at all, he should not be denied the right of appeal to them. Should the Commission fear that it may be prejudiced by any conclusion reached in this action, it may of course apply to be joined as a party.

The motion should be dismissed, with leave to the plaintiff to file statement of claim as amended; costs to be costs in the cause on the successful party.

From these judgments the defendants in each case appealed to a Divisional Court, and the appeals were argued before ANGLIN, MAGEE, and CLUTE, JJ., on the 12th February, 1909.

J. S. Fullerton, K.C., and *F. R. MacKelcan*, for the appellants the city of Toronto. The action is to set aside a contract between the defendants and the Hydro-Electric Power Commission of Ontario, which, as admitted by the plaintiff, has been executed, though he asserts that it has not been delivered. Both parties to that contract are necessary parties to this action, and not merely proper parties, a distinction which Latchford, J., failed to make: *Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, 27 Gr. 592, and cases there cited; Encyc. of Pleading and Practice, vol. 15, pp. 611-615. [ANGLIN, J., referred to Rule 206, and asked if there is any such Rule in the United States Courts.] That Rule is important, but does not apply to the case of necessary parties.

[ANGLIN, J. referred to the judgment of Mr. Justice Proudfoot in *Jones v. Imperial Bank of Canada* (1876), 23 Gr. 262.] That was a different case, and was before the Court in the case in 27 Gr. already cited. If the necessary party cannot be brought before the Court the case cannot go on. [CLUTE, J.:—That was the old rule.] Under 7 Edw. VII. ch. 19, sec. 23, no action can be brought against the Commission without the consent of the Attorney-General, which has not been obtained in this case. [MAGEE, J.:—That Act may not apply to such an action as this.] It is the very object aimed at by the Act, and if the action were such as ought to be brought, the Attorney-General would not withhold his consent. The adjudication spoken of in Rule 202, which is referred to by Latchford, J., as analogous to the present case, applies only to parties actually before the Court. Does Rule 206 really go any further than that? [MAGEE, J.:—No judgment given in this case would bind the Commission—it would simply be a precedent.] If a contract is declared void, the decision affects both parties. [CLUTE, J., asked as to the position of the plaintiff.] He is a ratepayer. He stood by till the Act was passed, and cannot now attack the by-law. He can only attack this contract on grounds special to himself: *Hope v. Hamilton Park Commissioners* (1901), 1 O.L.R. 477. The case of *Scott v. Patterson*, cited by Latchford, J., is distinguishable and in any event does not bind this Court. The Legislature is the supreme authority, and it has declared that the execution of this contract shall be valid. Rule 206, relied on by the plaintiff, applies only to misjoinder, not to nonjoinder. [ANGLIN, J., said that point was concluded against the defendants by authority and referred to *Carter v. Clarkson* (1893), 15 P.R. 379.] The view taken in Holmsted & Langton's note to Rule 206 (3rd ed., p. 376) as to misjoinder including nonjoinder is unsound. [ANGLIN, J., referred to the judgment of Lord Penzance in *Kendall v. Hamilton* (1879), 4 App. Cas. 504, as being against the defendants' contention.] The Legislature wished to protect this transaction from being questioned unless with their consent: *Gregory v. Stetson* (1880), 103 U.S. 579; *Browne v. Blount* (1830), 2 R. & M. 83. Unless a personal judgment should be a nullity, it must interfere with the rights of other parties.

E. E. A. DuVernet, K.C., for the appellants the city of London,

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said that he associated himself with the counsel who had already addressed the Court in their arguments. He referred to the application for a fiat, and its result, and said that it was the intention of the Legislature to place the right of suit in the hands of the Attorney-General. The question of electric power is a new one, and the effect of the Acts dealing with it is to take away from the Courts the power to deal with it, unless with the consent of the Attorney-General: *Conway v. Wade* (1908), 24 Times L.R. 874, at p. 877; *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 12 O.W.R. 298, at p. 301*. Are not the powers of the Commission as extensive as if there were a Power Department of Government, and is it not merely a question of the power of the Legislature to carry its intention into effect? The following cases and authorities were referred to: *London County Council v. Attorney-General*, [1902] A.C. 165, per Halsbury, L.C., at p. 168; *Devonport Corporation v. Tozer*, [1903] 1 Ch. 759; *Johnston v. Consumers' Gas Co. of Toronto*, [1898] A.C. 447; *Hare v. London and North-Western R.W. Co.* (1860), 1 J. & H. 252; Encyc. of Pleading and Practice, vol. 15, note at foot of p. 617, and cases there cited; *Schidkowski v. Feldman*, in *Times* newspaper for the 29th January, 1909.

E. F. B. Johnston, K.C., *H. O'Brien*, K.C., and *J. S. Lundy*, for the plaintiff Beardmore, contended that it is not the case that there is an existing contract which can be enforced against either party. All the legislation on the subject is of the most tentative character. It is idle to say that the powers of the Commission can be affected by a judgment in this case. [ANGLIN, J., remarked that the Court can only deal with the question of practice on this application.] The plaintiff does not know if this contract has been delivered. That and other questions of fact may be tried, and the plaintiff should have the status and rights of a litigant at the trial. As to the question of practice, the old equity system, formerly in force in England, has been introduced into the United States, but there are no rules in that country having so wide a scope as our Rule 206. It is clear that under that Rule misjoinder includes nonjoinder: *Van Gelder, Apsimon & Co. v. Sowerby Bridge, etc., Society* (1890), 44 Ch.D. 374, per Cotton, L.J., at p. 390, and

* The judgment of Riddell, J., in this case was affirmed on the 5th April, 1909, by the Court of Appeal, 18 O.L.R. 275.

Lindley, L.J., at p. 392; *Edward v. Lowther* (1876), 45 L.J.C.P. 417, at p. 419; *Drage v. Hartopp* (1885), 28 Ch.D. 414. These cases shew there is no such exact rule as has been contended for by the defendants.

J. M. McEvoy, for the plaintiff Smith, referred to *Young v. Corporation of Ridgeway* (1889), 18 O.R. 140, which, if not a binding authority, is at all events a precedent in favour of the plaintiff's contention.

Fullerton, K.C., and *DuVernet*, K.C., in reply.

February 13. ANGLIN, J.:—The defendants in both actions appeal from orders of Latchford, J., of the 6th January, 1909, dismissing their motions to strike out the statements of claim in these actions as frivolous and vexatious, and disclosing no reasonable causes of action, pursuant to Rule 261, or staying the actions until the plaintiffs shall have added as co-defendants the Hydro-Electric Power Commission. In each action it is sought to have declared *ultra vires* a contract made, or about to be made, by the municipal corporation with the Power Commission, on the ground that such a contract can be validly entered into by a municipality, only with the assent of the electors, and that there is material variation between the contract attacked, and the proposition submitted to the electorate, in each case, in the form of a by-law which received their approval; and for consequential relief.

In the action against the city of Toronto a statement of claim has been delivered, but no further proceedings have yet been taken. In this statement of claim the constitutionality of a section of the Act respecting the Hydro-Electric Power Commission, which provides that "without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office," is attacked.

In the action against the city of London the statement of defence has been delivered and the reply thereto, and in the reply the plaintiff Smith impugns the validity of the several statutes passed by the Legislature respecting the Hydro-Electric Power Commission, in the years 1906-7-8.

It does not seem necessary upon the present motions to con-

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sider the constitutional questions raised by the plaintiffs, and the Court deems it inexpedient to express any view upon these questions, or upon the right of the Court to entertain them.

While the motions before Mr. Justice Latchford were pending, the plaintiff in each case made application to the acting Attorney-General for a fiat permitting the joinder of the Commission as a defendant. In the memorandum of Sir James Whitney refusing the plaintiffs' applications, the following paragraph is found:—

"Apart from the question of fraud, the plaintiff's contention in each case rests upon the view that the municipal council had not the power under the statute to finally enter into contracts with the Hydro-Electric Power Commission without submitting the terms of them to the ratepayers. I have personal knowledge that this was not the intention of the Legislature, and I cannot divest myself of that knowledge. It may be that at its next session, which cannot now be long delayed, the Legislature may make a declaration on the subject."

In view of this statement, the Court suggested to counsel for the plaintiffs that, inasmuch as the Legislature is called for the 16th February instant (Tuesday next), it might be well to allow these appeals to stand until it is known whether legislation will be passed such as is indicated by the acting Attorney-General. It was pointed out that by such legislation the main objections of the plaintiffs to the contracts which they attack might be entirely overcome, and it was further suggested that, out of courtesy to the Legislature, it might be proper to await its action. Counsel, however, declined to assent to this course being taken, and insisted that the plaintiffs' actions should not be longer stayed by the pending motions, unless, in the view of the Court, the defendants are entitled to such stay as a matter of strict right. In view of this attitude of counsel, the Court is of opinion that it should not withhold judgment upon the defendants' appeals.

It has been settled by numerous authorities that a pleading should not be struck out upon summary application under Rule 261, unless it is, upon mere perusal, obviously unsustainable—not merely demurrable, but plainly and incontrovertibly bad and insufficient—unless, indeed, the Court is satisfied, in the case of a statement of claim, that the plaintiff clearly discloses no cause of action at all. So far from this being the case with regard to the

statements of claim now before the Court, they appear to disclose causes of action substantial in character (*Scott v. Patterson*, 17 O.L.R. 270), and such that it would be quite unjustifiable summarily to terminate the plaintiffs' rights and prevent them from further prosecuting their actions, by orders interlocutory in character, and such as might preclude their obtaining, in respect of the important questions which they raise, the opinion of such an appellate tribunal as the Supreme Court of Canada, or the Judicial Committee of the Privy Council, to one or other of which they would be entitled to carry their cases in due course upon appeal from judgments disposing of them after trial. Upon this short ground, and without further discussing questions upon which it would not be proper to prejudice the rights of either party by any premature expression of opinion, the present appeals, so far as they ask an application of the provisions of Rule 261 to these actions, should be dismissed.

Upon the other branch of their appeals the defendants urge that judgments declaratory of the invalidity of the contracts in question must necessarily affect the rights and the position of the Hydro-Electric Power Commission, which is a party to such contracts, and that the Commission is therefore a necessary and indispensable party to each action.

For the purposes of the present motions the allegations in the statements of claim must be assumed to be true. In the statement of claim in the action against the city of Toronto it is impliedly alleged that the contract, although executed, has not yet been delivered by the defendants. There is not such an allegation in the London case. Counsel stated that by inadvertence there were omitted from the statement of claim in each action allegations that an order in council had not yet been passed expressly declaring that the agreement should be binding upon the Commission, and that for lack of such an order the contract is not binding in either case upon the Commission, because of a provision to that effect contained in clause 12 thereof. (See 8 Edw. VII. ch. 22, schedule B, clause 12.) As amendment would no doubt be allowed to the statement of claim, enabling the plaintiff in each case to raise this issue, the present motions should be dealt with as if such amendment had been made.

In order to determine whether the Power Commission has or has not contractual rights which might be affected by judgments

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declaring the contracts void, it would probably be necessary to have the facts established, whether there has or has not been delivery of the contract in the case of the city of Toronto, and, in each case, whether or not there has been a declaration by order in council that the contract is binding. If there has been no delivery of the Toronto contract, although it has been signed by both parties, it is, of course, not binding upon either. If there has been no order in council passed declaring either contract binding upon the Commission, its obligations, and probably also its rights, are at most contingent. Whatever may be done towards validating these contracts by legislation, the Court should, I think, assume that, pending litigation in which the power of the municipalities to make the contracts is questioned, the Lieutenant-Governor would not by orders in council declare them binding upon the Commission; and that, in the event of the Courts declaring them to be *ultra vires* of the municipal corporations, such orders in council would not thereafter be passed.

Assuming the allegations in the statement of claim in the action against the city of Toronto to be true, the Commission is probably not a necessary party to the action against that city, if, indeed, it would be a proper party. If there has been no order in council declaring either contract binding upon the Commission, it is questionable whether that body should be regarded as a party which ought to be brought before the Court in either action.

But, assuming that contracts do exist which should be dealt with as binding upon both the municipalities and the Commission, the present appeals should not, in my opinion, succeed. For the appellants, reliance was mainly placed upon two decisions of the former Court of Chancery in this Province—*Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co.*, 27 Gr. 592, and *Jones v. Imperial Bank of Canada*, 23 Gr. 262. Both decisions rest upon the case of *Hare v. London and North-Western R.W. Co.*, 1 J. & H. 252, in which Vice-Chancellor Wood said, at p. 253: "If I allowed the suit to proceed in the absence of the other companies, any decree which I might make would not bind them, and the defendants might become liable in damages for obeying the order of the Court." In none of these three cases does there appear to have been any difficulty in bringing before the Court the parties upon whose presence the defendants insisted. That fact entirely

distinguishes them from the present case, and it is quite probable that, having regard to the principles upon which the discretion now vested in the Court as to the addition of parties should be exercised, in the same state of facts as existed in these cases, orders would now be made, as a matter of discretion, staying proceedings in the actions until the required parties had been brought in. It should further be observed that these are all decisions of a single Judge, and are not binding upon this Court. They were rendered in the days when demurrers and pleas in abatement prevailed. Actions were then often defeated by misjoinder or nonjoinder of parties. The effect of the Judicature Acts was to abolish demurrers for want of parties: *Werderman v. Société Générale D'Electricité* (1881), 19 Ch.D. 246. For the demurrer was substituted the right to move the Court that the proper and necessary parties should be added, and "it is of the essence of the procedure since the Judicature Act to take care that an action shall not be defeated by the nonjoinder of right parties:" *Van Gelder, Apsimon & Co. v. Sowerby Bridge, &c., Society*, 44 Ch.D. 374, 394.

It has been said that the Judicature Rules have not altered the legal principles with regard to parties to actions, or the right of a defendant to insist on certain parties being before the Court. This statement is no doubt correct *sub modo*. Where it is practicable to bring before the Court parties who ought to be joined, the plaintiff will still be required to add them and his proceedings will be stayed until he does so. To this extent the rights of a defendant are the same as before the Judicature Act. But the Court, upon an application to add parties deemed necessary, has now a discretionary power to grant or to refuse the order; and it is expressly empowered to "deal with the matter in controversy so far as regards the rights and interests of the parties before it:" Rule 206 (1).

It is pointed out by Lord Esher, in *Robinson v. Geisel*, [1894] 2 Q.B. 685, that the circumstances which would warrant the Court in refusing to order the joinder as a defendant of a party who ought under ordinary circumstances to be so joined, are "that to do otherwise would defeat the power of the Court to deal with the rights and interests of the parties actually before it:" p. 688. The learned Judge continues: "It seems to me that if it is apparent that every effort has been made to find the co-contractor, the Court may say that it would be contrary to the spirit of Order xvi., r. 11,

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that the determination of the plaintiff's rights should be put off indefinitely. I am the more convinced that this is the right course to take because it by no means defeats the right of the defendant against his co-contractor, though it may possibly put him to greater inconvenience than if the action had been tried against all jointly." Kay, L.J., uses these words: "Is it right or fair that where the plaintiff has done all he can to bring in all the persons who ought to be joined as defendants, his action should be stayed for an indefinite time until he is able to find them all? In my opinion it would be unjust . . . unless there is some rigid rule of law that obliges him to have all the defendants before the Court before he can proceed against any of them. The rule seems to me to be directed to this—that when pleas of abatement were abolished there should be a large discretion in the Court to permit the action to go on, so that the rights of the parties before the Court may be determined even though all parties to the action are not before it. The Court below in its discretion allowed this action to go on; and certainly this Court, with its present knowledge of the facts of the case, ought to take the same course." A. L. Smith, L.J., also expressed the view that for good reason the Court might refuse to insist on a person who ought to be a party being brought before it as a defendant.

Likewise in *Roberts v. Holland*, [1893] 1 Q.B. 665, Wills, J., says: "It can never have been intended that where . . . no person can be added as a plaintiff without his own consent in writing, the nonjoinder of a party as plaintiff is to be fatal to the action. It is a matter of discretion, which is to be exercised by the Court or a Judge as may appear to be best." And Charles, J., says: "Where it is sought to join as co-plaintiffs five tenants in common, who cannot be joined without their own consent in writing . . . there is a discretion to stay the action in order that their consent may be obtained, if such a course appears advisable, or, if not, to allow the action to proceed."

In *Norris v. Beazley* (1877), 2 C.P.D. 80, Denman, J., said: "I think there may be cases where, though a person is not within the scope of the plaintiff's attack in the first instance, he ought to be introduced as a defendant to enable the Court to settle all the questions involved in the action. I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the

plaintiff does not desire to proceed, unless a very strong case is made out, shewing that in the particular case justice cannot be done without his being brought in." Coleridge, C.J., said: "The defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and it (the rule for adding parties) was never intended to apply where the person to be added as a defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. It seems to me that this application is answered, and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant, between whom and the company there may be questions which will afterwards have to be settled."

In *Leduc & Co. v. Ward* (1886), 54 L.T.N.S. 214, the discretion of the Court to require, or to refuse to require, that a person against whom the plaintiff does not desire to proceed shall be added as a party at the instance of the defendant is again affirmed. Lord Coleridge said, at p. 216: "I think that a rule, which enacts in terms that the nonjoinder of parties will not defeat the plaintiff's action, clearly abolishes the effect of the old plea in abatement, and, to my mind, it is quite plain that what is intended is that the plaintiff has a right to add parties as defendants, but that the defendant has no corresponding right unless he can shew that not doing so will prevent the Court from effectually doing justice." Hawkins, J., said that the applicants' counsel had failed to satisfy him "that this is a case in which such discretion ought to be exercised in favour of his clients."

From these and many more authorities which might be cited it is clear that there is now a discretion in the Court to determine whether or not, upon the particular facts of each case brought before it, an order should be made requiring the plaintiff, *in invitum*, to add as defendants persons not before the Court. Where, without such addition, some relief can be given the plaintiff, and the effect of requiring him to add parties would be to entirely defeat his action, the discretion of the Court should be exercised by refusing the order.

It is pointed out on behalf of the appellants that our Rule 206 (1) differs from the corresponding English Rule—Order xvi., r. 11—in that whereas our Rule reads, "an action shall not be defeated

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by reason of the misjoinder of parties," the English Rule provides that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties," and the omission from our Rule of the words "or nonjoinder" is relied upon as rendering the cases upon the English Rule dealing with nonjoinder inapplicable. As pointed out in *Leduc & Co. v. Ward*, *supra*, the Rule, under the original English Judicature Act of 1875 was in the same terms as our present Rule, and the words "or nonjoinder" were inserted when the English Act of 1883 was passed. In 1879 Lord Penzance, in *Kendall v. Hamilton*, 4 App. Cas. 504, at p. 531, said: "That Act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of both legal and equitable rights, which is independent of all the old rules of law on that subject. Particularly it did away with all objections and defences arising out of the misjoinder or nonjoinder of parties, either plaintiff or defendant. Since that Act no such thing as a plea in abatement is possible. The nonjoinder of any party under any circumstances has ceased to be an answer, objection, or defence to the action. In such a case the action goes on, and the Court or a Judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added."

In *Leduc & Co. v. Ward*, Coleridge, C.J., quotes this language of Lord Penzance with approval, adding these words: "Now that is the rule upon which Lord Penzance delivered that judgment, and Lord Cairns says nothing in contradiction to it." *Norris v. Beazley*, 2 C.P.D. 80, above referred to, was decided in the year 1877. It is reasonably clear, therefore, that under the English Rule of 1875 misjoinder was deemed to include nonjoinder, and, indeed, it would hardly be possible to give the Rule any other construction, in view of the words which immediately follow, *viz.*, "and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties before it:" Con. Rule 206 (1); language which refers clearly to the absence of proper parties, and, therefore, to nonjoinder—language which would be quite inappropriate unless misjoinder were deemed to include nonjoinder.

Holmsted & Langton, in their valuable work on the Judicature Act, 3rd ed., at p. 376, point out that the other sub-clauses, which are alike in the English and the Ontario Rules, also indicate that misjoinder includes nonjoinder, and in *Carter v. Clarkson*, 15 P.R. 379, at p. 380, Galt, C.J., speaking of our own Rule, says: "The Rule applies not only to the nonjoinder, but to the improper joinder, of a party as defendant."

I think it abundantly clear upon these authorities that under our Rule 206 misjoinder must be deemed to include nonjoinder. That being the case, the authorities upon the English Rule are applicable, and upon them there can be no doubt that it is now discretionary with the Court to proceed or to refuse to proceed with the action in the absence of parties who, the defendants contend, ought to be before it.

In the exercise of this discretion, cases in which rights of property of the absent party might be affected should perhaps be distinguished from cases in which he would only be commercially affected by a judgment against the defendant. Lord Justice Lindley, in *Moser v. Marsden*, [1892] 1 Ch. 487, at p. 490, says: "Counsel for the applicant grounded his argument on the allegation that Montfort's interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant? . . . I can understand the application of the rule where the property of a third party is affected. He may well say, 'I am not to be deprived of my property in my absence.' But this case does not come up to that." But see Con. Rule 202.

In the present cases the interests represented by the Hydro-Electric Power Commission may be commercially affected by a judgment in favour of the plaintiffs. Those interests cannot be legally affected. Neither will the Commission be deprived of any property in its absence.

The plaintiff in each case has done all in his power to bring in the Commission as a defendant. It refuses to consent to be joined, and the present defendants insist that it cannot be joined without the fiat of the Attorney-General, under sec. 23 of 7 Edw. VII. ch. 19. These defendants strenuously and successfully opposed

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the plaintiffs' application for such a fiat. Assuming the validity of the legislation requiring this fiat, and its applicability to the present cases—points which the plaintiffs contest, but upon which we deem it inexpedient to express an opinion—its effect is to withdraw the Hydro-Electric Power Commission from the jurisdiction of this Court.

Although co-contractors are regarded as parties whom a defendant is ordinarily entitled to require a plaintiff to join, in *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.*, [1893] 1 Q.B. 422, it was held that where a co-contractor is out of the jurisdiction it is not necessary to the continuance of the action that he should be joined as a defendant. The Commission may be regarded as placed without the jurisdiction of this Court. A defendant moving to stay for nonjoinder of another party as defendant should shew that the latter is within the jurisdiction: *MacArthur v. Hood* (1885), 1 Cab. & E. 550; and that he can be brought before the Court: *Drage v. Hartopp*, 28 Ch.D. 414.

Assuming the validity and applicability of this legislation, the Commission cannot be added as a party defendant without the fiat of the Attorney-General. It is, therefore, in much the same position as a person who is sought to be added as a plaintiff in an action, and who may not be so added without his consent; and, as Wills, J., said in *Roberts v. Holland*, [1893] 1 Q.B. 665, "it can never have been intended that where . . . no person can be added as a plaintiff without his own consent in writing, the nonjoinder of a party as plaintiff is to be fatal to the action."

Although adding a defendant against the wishes of the plaintiff "is not a case of making a person a plaintiff against his will, it certainly is the case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be plaintiff, without his consent:" *per Coleridge, C.J.*, in *Norris v. Beazley*, 2 C.P.D.; at p. 83.

Unless the present plaintiffs are to be allowed to proceed with their actions without joining the Commission as a defendant, whatever rights they may have, if any, against the defendants before the Court will be in effect denied them. Any judgment which may be pronounced in their favour cannot legally affect the rights, contractual or other, of the Commission, which is not a party to these actions. Indirectly and commercially it may be

affected, but not legally, and not in the sense of interfering with its property. The Court has a discretion to act or to refuse to act upon the application to stay proceedings until the desired party is added. It may, and, in such cases as the present, I think it should, deal with the matter in controversy, so far as regards the rights and interests of the parties before it, as directed by Rule 206. To do otherwise would be in effect to defeat the action of the plaintiffs by reason of nonjoinder of parties—the very thing which this Rule was intended to prevent. Where, as here, through no fault of their own, the plaintiffs are unable to bring before the Court parties who, if binding contracts exist, are admittedly proper parties, and parties who ought to be joined if it is reasonably possible to join them, they should not, because of their inability, be prevented at this stage from further proceeding with their actions. At the same time it should be left open to the defendants to raise this objection for want of parties by their pleadings, if so advised, in order that it may be dealt with by the judgments which dispose of the merits of the actions at the trials: Con. Rule 205. The orders upon these interlocutory applications should not conclude them upon their right to insist that no judgment should be pronounced against them in the absence of the Hydro-Electric Power Commission.

If the matter were finally concluded against the plaintiffs, upon the present motion, as already pointed out, it may well be that their actions would be snuffed out by interlocutory orders as to which there may be only limited rights of appeal. By leaving the matter open to be dealt with in the judgments at the trials, there is no reason why this question, with the other questions involved in these important actions, should not be carried on appeal to the Supreme Court of Canada or to the Judicial Committee of the Privy Council. That risk the plaintiffs must assume.

For these reasons, and because I do not think that we should interfere with the discretion exercised by my brother Latchford, I would dismiss the appeals of the defendants from his orders. The costs will be costs in the cause. The orders of this Court may, if the defendants so desire, contain provisions safeguarding their right to raise the questions dealt with in this judgment by their pleadings, and to have them disposed of by the trial Judges when dealing with the merits of these actions, unfettered by the disposition of the present motions.

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Attention should perhaps be directed to the fact that it is open to grave doubt whether the defendants could have maintained their appeals to this Court as of right. The applications before my brother Latchford, though made in Court, should, under the practice, have been made before a Judge in Chambers, and the orders appealed from should have issued as Chambers orders. From any order pronounced by a Judge in Chambers, which does not finally dispose of the action, an appeal does not lie without special leave: Rule 1278.

MAGEE and CLUTE, JJ., concurred.

G. G.

[IN CHAMBERS.]

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Libel—Newspaper—Security for Costs—Right of Sub-editor to Security—Application first Made to Master in Chambers—Finality of Decision—“Judge of the High Court”—Leave to Appeal from Order of Judge in Chambers—Con. Rule 1278—Affidavit in Support of Motion for Security—Sufficiency—R.S.O. 1897, ch. 68, secs. 10, 15.

In an action for libels contained in a newspaper the defendant moved for security for costs under R.S.O. 1897, ch. 68, sec. 10, alleging in his affidavit that he was the “sporting editor” of the newspaper, and that he had the sole control and editorship of the sporting and dramatic intelligence:—

Held, that, as the editor of a department of a newspaper, he was entitled to security for costs.

Semble, that all who are engaged in any capacity in the work of publishing the newspaper in which an alleged libel appears are entitled to the protection given by the statute.

Egan v. Miller (1887), 7 C.L.T. Occ. N. 443, and *Neil v. Norman* (1901), 21 C.L.T. Occ. N. 293, distinguished.

The plaintiff having moved under Con. Rule 1278 for leave to appeal from the above decision:—

Held, that leave could not be given under either branch of the Rule, as there were no “conflicting decisions by Judges of the High Court upon the matter involved in the proposed appeal,” and there appeared to be no “good reason to doubt the correctness” of the order sought to be appealed from.

The defendant’s affidavit as to merits said, “I am advised by my solicitor and I believe that I have a good defence on the merits,” the statute requiring “an affidavit by the defendant or his agent . . . that the defendant has a good defence upon the merits:”—

Held, that the affidavit was sufficient.

Crossby v. Innes (1837), 5 Dowl. P.C. 566, followed.

Robinson v. Morris (1908), 15 O.L.R. 649, distinguished.

The statute requires that the defendant’s affidavit should shew “that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous.” The defendant swore that the words used by him were “innocent and harmless:”—

Held, that this was equivalent to swearing that the grounds of action were trivial and frivolous.

The Master in Chambers is not to be considered "a Judge of the High Court," under sec. 15 of the Act, and the order made by him was, therefore, not a final one under that section, but was subject to appeal to a Judge of the High Court.

Quare, whether the order of MEREDITH, C.J., being "an order made under section 10 by a Judge of the High Court," was non-appealable under sec. 15.

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APPEAL by the defendant from an order of the Master in Chambers, dated the 27th February, 1909, dismissing his motion for an order for security for costs under R.S.O. 1897, ch. 68, sec. 10,* in an action brought for libels contained in a newspaper, and subsequent application by the plaintiff for leave to appeal from the order of MEREDITH, C.J.C.P., allowing the defendant's appeal.

The motion for security for costs was argued before the Master in Chambers on the 25th February, 1909.

John King, K.C., for the defendant.

Featherston Aylesworth, for the plaintiff.

February 27. THE MASTER IN CHAMBERS:—This is an action for libels published in the "Times" newspaper.

The plaintiff is said in the statement of claim to be the sporting editor of the Hamilton "Spectator," and the defendant to be a reporter for the "Times," of that city.

The defendant moves for security for costs under R.S.O. 1897, ch. 68, sec. 10, and makes affidavit that he is the sporting editor of the "Times;" that the action is frivolous, the words complained of being innocent and harmless; that he has a good defence; and that the plaintiff is financially worthless.

The defendant's affidavit says that he has "the control and

*R.S.O. 1897, ch. 68, sec. 10.—(1) In an action brought for libel contained in a newspaper, the defendant may, at any time after the filing of the statement of claim, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant or his agent, shewing the nature of the action and of the defence, and shewing that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for the costs to be incurred in such action, and the security so ordered shall be given in accordance with the practice in cases where a plaintiff resides out of the Province, and the order shall be a stay of proceedings until the proper security is given as aforesaid.

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editorship of the sporting and dramatic intelligence, which is in my hands wholly."

For the motion were cited the following authorities: King's Law of Defamation, pp. 439 and 441; *Egan v. Miller* (1887), 7 C.L.T. Occ. N. 443; *Neil v. Norman* (1901), 21 C.L.T. Occ. N. 293; *Powell v. Ruskin* (1899), 35 C.L.J. 241; Fisher & Strahan's Law of the Press, 2nd ed., pp. 52 and 148. None of these authorities defines what an editor is, and in all the three cases the order for security was refused.

From the reasoning in *Egan v. Miller*, I should think the defendant here is not an editor within the principle of that decision, unless he has power to publish at his discretion (or perhaps I should rather say indiscretion). The protection of the Act, as it would seem, can only apply to the editor who is responsible for the general management of the paper and its policy in regard to matters of every kind; judging from the above decisions. It is not necessary to extend the words of the Act beyond that limit. It cannot be presumed that it was the intention of the Legislature to give the benefit of sec. 10 to every person on the staff of a newspaper who is by courtesy styled an editor of some one department. To do so would be legislation. It is not without significance that in no case yet has security been given to any one in the position of the defendant.

I do not find in the defendant's affidavit any assertion "that the statements complained of were published in good faith," which the Act requires to be done.

As the motion also asked to have the statement of claim amended, and it was conceded that this must be done, the order will be directing that to be done, and refusing security; and the costs of the motion will therefore be in the cause.

This action is a counter-stroke to that of *Mills v. Hamilton Spectator Co.*, which was before me a few days ago. Both of them seem frivolous in the ordinary if not in the technical sense of the word. They can only be paralleled by the strife of the rival editors of Eatanswill, embalmed in the pages of *Pickwick*, where for nearly a century they "have added to the sum of human pleasure and enriched the gayety of nations."

From this judgment the defendant appealed, and the appeal

was argued before MEREDITH, C.J.C.P., in Chambers, on the 9th March, 1909.

John King, K.C., for the appellant.

Featherston Aylesworth, for the respondent.

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March 30. MEREDITH, C.J.:—This is an appeal by the defendant from an order of the Master in Chambers dated the 27th February, 1909, dismissing his motion for an order for security for costs.

The application for the order was made under sec. 10 of the Act respecting Libel and Slander, R.S.O. 1897, ch. 68.

The defendant is the sporting editor of the Hamilton "Times," and the alleged libel complained of in paragraph 2 of the statement of claim was published in that newspaper.

The only question argued before me was as to whether the appellant is a person entitled to invoke the provisions of sec. 10, which the learned Master in Chambers has held he is not, being of opinion that the section applies, in the case of an editor, only where the defendant is an "editor who is responsible for the general management of the paper and its policy in regard to matters of every kind."

In reaching this conclusion the learned Master in Chambers followed, as he said, the reasoning in *Egan v. Miller*, 7 C.L.T. Occ.N. 443.

That case, the decision being that of a Divisional Court, is, of course, binding on me. The report is a very meagre one, and is as follows: "The Court held that other expressions in the Act clearly shewed that the provision as to security for costs applied only to the publisher, editor, or proprietor of a newspaper. The very section in question required the defendant to swear that 'the statements complained of were *published* in good faith.' Appeal dismissed with costs."

From the statement of the facts it appears that the defendant was not the editor or proprietor or publisher, but a correspondent of a newspaper, and that the libel charged was in respect of a letter signed by the defendant, published in a newspaper with which he had no connection.

I am unable to find anything in the case, or in the reported reasons for the decision, that requires that the term "editor"

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should have given to it the limited meaning which the learned Master in Chambers has assigned to it.

The defendant in that case had no connection with the newspaper in which his letter was published, and what I understand the Court to mean is, that the section was not intended for the benefit of a defendant who occupied that position, but only of those who were connected with the publishing of a newspaper, such as a publisher, editor, or proprietor.

It is unnecessary for me to say what my view as to so restricted a construction of the section would have been if the matter were *res integra*, but it may not be improper to say that such a construction very much narrows the meaning of the comprehensive words with which the section opens: "In an action brought for libel contained in a newspaper, the defendant may . . .;" and that it does not appear very clear why a correspondent who sends to a newspaper a communication which is published in it may not, in the popular sense at all events, be properly said to have published the communication.

However that may be, in my opinion there is nothing in the Act or in the case which makes it necessary to hold that the editor of a department of a newspaper is not entitled to avail himself of the protection given by sec. 10. To narrow the section by limiting its operation to the case of a defendant who is such an editor as the Master in Chambers speaks of, and to the publisher and proprietor, would in my judgment take away a protection which the Legislature intended should be given at all events to those who were engaged in the work of publishing the newspaper in which the alleged libel appeared, whether as publishers, proprietors, editors-in-chief, editors of departments, reporters, or printers.

How can it lie in the mouth of the plaintiff to say that the defendant, who, he alleges, published the libel in the Hamilton "Times," cannot properly depose that "the statements complained of were published in good faith," or why should the word "published" in the section be given a different meaning to that which it bears in the statement of claim?

There is nothing in the judgment of the learned Judge of the county Court of the county of Perth, in *Powell v. Ruskin*, 35 C.L.J. 241, or in the quotation which he makes from the judgment of the Chancellor in *Bennett v. Empire Printing and Publishing Co.* (1894),

16 P.R. 63, at p. 69, opposed to the view I have expressed; and indeed what is said is rather in accord with it.

In *Neil v. Norman*, 21 C.L.T. Occ.N. 293, all that was decided was that a country correspondent of a newspaper was not entitled to the benefit of sec. 10, and the observations I have made as to *Egan v. Miller* apply to what was said by Robertson, J., as to the effect of that case.

On the whole, I am of opinion that the appeal should be allowed and the order appealed from discharged, and, subject to any other question which may be open to the respondent in opposing the making of the order, an order for security for costs should be made. Costs here and below in the cause.

The plaintiff moved under Con. Rule 1278 for leave to appeal from the judgment of MEREDITH, C.J., and the application was heard before RIDDELL, J., on the 5th April, 1909.

F. Morison, for the plaintiff.

John King, K.C., for the defendant.

April 6. RIDDELL, J.:—Until recently an order such as that against which it is now desired to appeal, would (subject to a possible statutory limitation) have been appealable as of right; but the recent Rule No. 1278, for well or ill, has much limited such right to appeal. The Rule provides that no appeal shall lie in such cases without leave, and such “leave shall not be given unless (a) there are conflicting decisions by Judges of the High Court upon the matter . . . and it is, in the opinion of the Judge [applied to for leave], desirable that an appeal should be allowed; or (b) there appears to the Judge to be good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and the appeal would involve matters of such importance that, in the opinion of the Judge, leave to appeal should be given.”

The defendant is in the statement of claim described as a reporter of “The Times,” Hamilton; but in his affidavit, which is not controverted, he calls himself “the sporting editor” of the Hamilton “Times,” and swears that he has “the control and editorship of the sporting and dramatic intelligence, which is in” his “hands solely.”

Referring to clause (a) of the Rule, it is argued that there are decisions which the learned Chief Justice disregarded. They were certainly not overlooked, as they are referred to in the judgment.

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The first case is *Egan v. Miller*, 7 C.L.T. Occ. N. 443. In that case the defendant was a correspondent of a newspaper; he wrote and signed a letter, and this was printed in the newspaper, with which the defendant had no other connection. The Divisional Court held that he was not entitled to an order for security for costs; and this is the full extent of the decision. It is true that in the scanty note which we have of the case it is said that the Court held that the provision applied "only to the publisher, editor, or proprietor of a newspaper." But this is a mere *obiter dictum*, not called for by and not forming part of the decision.

In *Neil v. Norman*, 21 C.L.T. Occ. N. 293, the connection of the defendant with the newspaper was a little closer. It is said that he was a country correspondent of the paper; and the alleged libel was contained in one of his periodical contributions. Mr. Justice Robertson held that he was not entitled under the Act to security for costs. Again, the scanty report contains a statement that the learned Judge held that only the editor, publisher, or proprietor is entitled to security, but again this is *obiter*—the only decision being that the correspondent was not.

In *Powell v. Ruskin*, 35 C.L.J. 241, Judge Barron, of Stratford, acting as local Judge, held that advertisers were not entitled to an order for security for costs.

There are a number of cases in 16 P.R., 17 P.R., and 18 P.R., but in none of these is it held—that is, *decided*—that any one connected with a newspaper, from managing editor to printer's devil, is not entitled to security for costs. There are, therefore, no conflicting decisions of Judges of the High Court upon the matter involved in the appeal; and so no order can be made under clause (a), so far as this point is concerned.

It is said, however, that the affidavit should have been held insufficient under *Robinson v. Morris* (1908), 15 O.L.R. 649, as the affidavit as to merits says, "I am advised by my solicitor and I believe that I have a good defence on the merits," the statute requiring "an affidavit by the defendant or his agent . . . that the defendant has a good defence upon the merits." This is answered by the old case of *Crossby v. Innes* (1837), 5 Dowl. P.C. 566. The affidavit there was by the defendant that he had a good defence on the merits, "as he is advised and believes," and it was contended for the plaintiff that the defendant thus swore to the merits of his

defence in a qualified manner, only. But Williams, J., said, p. 568: "I think that affidavit is sufficient. It is made by the defendant himself, and if he is a person unacquainted with law, and knowing only the facts, he can only know the goodness of his defence in point of law from the advice of others. I do not, therefore, see how he could swear in a more satisfactory manner." There is no more reason for supposing a sporting editor to be acquainted with the law than the defendant in the case just cited, and therefore this clause answers the statute.

In other respects the affidavit might well have been drawn in exact compliance with the Act, but, following principle, and even though "the provisions of the statute must . . . be followed with some approach to strictness," as was held in *Robinson v. Morris*, 15 O.L.R. at p. 651, there is enough in this affidavit to meet the demands of the statute. The only doubt in my mind was whether the last prerequisite had been furnished. It will be seen that this statute, R.S.O. 1897, ch. 68, sec. 10, differs from R.S.O. 1897, ch. 89, sec. 2. The latter, as pointed out in *Robinson v. Morris*, requires the affidavit to shew four facts—this requires the affidavit to shew five, as follows: (1) the nature of the action; (2) the nature of the defence; (3) that the plaintiff is not possessed of property sufficient to answer costs (these three are the same in each statute); (4) that the defendant has a good defence on the merits; and (5) either (a) that the statements complained of were published in good faith, or (b) that the grounds of action are trivial or frivolous. The first four of these are met thus: the first, by making the statement of claim an exhibit; the second, by saying that the good defence sworn to consists in the fact that the words are innocent and harmless and not libellous; the third, almost, if not quite, in the words of the statute; the fourth I have spoken of at length. The fifth fails as to the first alternative; but I think that swearing that the words "are innocent and harmless" is equivalent to swearing that the "grounds of action are trivial or frivolous." I cannot, however, quite understand why, when a statute prescribes the form of an affidavit, such form is not exactly followed.

I am unable to give leave to appeal under clause (a) of the Rule.

As to clause (b), I am to see if there is good reason to doubt the correctness of the decision of the learned Chief Justice; that is,

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as I understand, I am to determine if, in my opinion—the best judgment I can bring to bear—there is any good reason why the decision should be held to be wrong. If that test is met, I should have no hesitation in holding that the appeal would involve matters of such importance that an appeal should be permitted. Making an order for security for costs often puts an end to an action. “In the ordinary case a plaintiff residing in Ontario, however poor he may be, may not be compelled to furnish security for the costs of an action as a term of being permitted to proceed.” *Robinson v. Morris*, 15 O.L.R. at p. 651. And it is, in my judgment, a matter of very great importance, and worthy of decision by the highest Court, whether a newspaper sub-editor can be allowed to libel a poor man with impunity for the reason that the libelled man cannot afford to put up security for the costs of an action.

But however important the question may be, I cannot give leave to appeal unless there appears to me to be good reason to doubt the correctness of the order.

The first point made is, that the decision of the Master in Chambers was final under sec. 15 of the Act; the argument being that the Master is given many of the powers of a Judge of the High Court, and that, as an application was made by the plaintiff to him in that capacity, he must be considered a Judge of the High Court for the purposes of this proceeding. That cannot be. Whatever his powers, he is not a Judge of the High Court; and the first part of the section no more applies to him than does the latter. It would not be argued that the Master has the power of hearing appeals from a local Judge; it is plain that such appeals must be heard by a Judge; such appeals have been heard by a Judge, as in *Neil v. Norman*.

The section was introduced by 57 Vict. ch. 27, sec. 7 (O.), (5th May, 1894), and the practice has been uniform. *Smyth v. Stephenson* (1897), 17 P.R. 374, *Drumm v. O'Beirne* (1897), *ib.* 376n., *Bartram v. London Free Press Printing Co.* (1897), 18 P.R. 11, are all instances of an appeal being heard by a Judge from the order of a local Judge.

The words “Judge of the High Court” have the same meaning in the earlier as in the latter part of the section. Appeals have been heard from time to time, since the enactment was passed, by Judges from the decisions of the Master, and, so far as I can find,

without question. The practice was followed in *Georgian Bay, etc., Co. v. World Newspaper Co.* (1894), 16 P.R. 320; *Macdonald v. World Newspaper Co.* (1894), *ib.* 324; *Lennox v. Star Printing and Publishing Co.* (1895), *ib.* 488; all since the Act, and all instances of appeals being entertained from the Master by a Judge of the High Court. It does not seem to have been doubted that the Master in Chambers had jurisdiction. If so, it would seem that the application may be made in the first instance either to the Master or to a Judge. An order made by the former is appealable; an order made by the latter is not. And it may be that the present order, being in fact an order made by a Judge of the High Court, is by statute made non-appealable. I do not need to pass upon that question here.

I do not think that there is any good reason to doubt the correctness of this decision, so far as it holds the defendant to be within the protection of the Act. The main contention is that the defendant is not an editor; and the decisions referred to are appealed to to shew that, if not, he is not protected by the statute. I have already pointed out that there is no such decision. The statute itself says: "In an action brought for libel contained in a newspaper, the defendant may . . . apply . . . for security for costs . . ." It does not say: "In an action brought against an editor, publisher, or proprietor of a newspaper for libel contained in a newspaper . . ." I can find nothing in the Act at all limiting the persons who may take advantage of this section. It is suggested that any one else than an editor, publisher, or proprietor could not swear that the statements complained of were published in good faith (7 C.L.T. Occ. N. 443). I can see no more difficulty in a writer swearing to this upon information and belief than to his swearing to a good defence on the merits upon such information and belief—and that we have seen is sufficient; and there is, in any case, no more difficulty in the way of a writer than there is in the way of a proprietor of a newspaper whose editor inserted matter without his knowledge, as in the recent case of *Scarrow v. Gummer* (1909), 13 O.W.R. 608.

That the anomaly would exist which is referred to in 35 C.L.J. 241, that a defendant libelled by a postal letter would be refused benefit by way of security, while, if the same "is contained in a newspaper," he must get it, by no means proves

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that all but editors, publishers, and proprietors are excluded from the benefit of the statute. The statute is itself an anomaly; and it is quite as anomalous to say that if an editor write a private letter to a friend containing a libel, no matter if that libel is to be read to a public meeting, he cannot get security for costs, but, if he print the letter in his paper so that his friend and the public may have it in print, he can. Either way, there is an anomaly. And is it not an anomaly that under the Revised Statute the editor of a paper published every two weeks is protected and the editor of one published every month is not?

Other Courts have said that the intention of this statute "is to protect newspapers, reasonably well conducted, with a view to the information of the public:" *Bennett v. Empire Printing and Publishing Co.*, 16 P.R. 63, at p. 69. That may be so; but I can find nothing of the kind in the Act; and the best manner of finding out what the Legislature means is to find out the meaning of what it says. Applying this rule, there is no reason that I can see for restricting the protection of the statute at all, or for reducing the meaning of the plain words, "libel contained in a newspaper." Were it not for authority binding upon me, I should be prepared to hold that even a correspondent could obtain security for costs if sued for the publication in a newspaper; of course this would not be so if the action were for the publication to the editor by letter. (I have had the papers available at Osgoode Hall in *Egan v. Miller* looked up, and I find that at least in one affidavit the solicitor swears that the libel sued for was "alleged to be contained in a letter of correspondence alleged to have been written by the defendant to a certain local newspaper published in the locality where the parties live." If this be so, the decision is wholly explained; but in other affidavits the libel is said to have been contained "in a letter published by the defendant in a country newspaper." I have not the statement of claim, and am not sure of the fact. If ever the question comes squarely before the Court as to the position of a correspondent sued, not for publishing*to the newspaper staff, but "in a newspaper," the precise facts of this case may require to be determined.)

Were it not for the cases referred to, I should be prepared to hold that the statute means what it says; but, even with the said cases and giving full effect to them, I think the least the statute

did was to throw a mantle of protection over all who are concerned in the actual publication in the newspaper and all who are responsible for the acts of those.

The reason for the legislation we need not inquire; it is no concern of the Courts; but it would seem that the Legislature has, for some reason, decreed that different laws shall be applied to all connected with newspapers published at intervals of not less than 26 days between issues and to those—editors or what not—who write private letters, or publish circulars, or monthly magazines.

It seems to me that all within the favoured group, whether proprietor, publisher, editor, printer, sub-editor, or what you will, must receive the protection of the Act respecting actions of libel and slander.

With that view of the law, it will be seen that, had the decision of the Chief Justice been the other way, I should have (*quantum valeat*) given leave to appeal; the decision being as it is, I do not think there is good reason to doubt its correctness.

The motion will be dismissed with costs to the defendant in any event of the action.

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[IN THE COURT OF APPEAL.]

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April 5.

Criminal Law—Abortion—Intent to Procure—Indictment—"Operate"—Use of Instrument—Evidence—Verdict—Crown Case Reserved—Form of Questions.

In an indictment laid under sec. 303 of the Criminal Code, R.S.C. 1906, ch. 146, which enacts that "every one is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever with the like intent," the first count charged that the accused, with the intent to procure a miscarriage, etc., did unlawfully use upon the person of the woman an instrument, etc.; the second count charged that with like intent the accused did unlawfully "operate" on the said woman. The evidence submitted by the Crown was directed solely to proof of the fact of the performance of an operation by the use of an instrument, substantially negating the use of the hand or finger alone for the alleged purpose. The jury, however, were charged—after they had intimated that they were not satisfied that the evidence established the use of an instrument—that the use of the hand or finger might be considered in dealing with the second count. The jury found the accused not guilty on the first count, but guilty on the second count:—

Held, MEREDITH, J.A., dissenting, that the second count might not unnaturally be regarded as a mere repetition in another form of the gravamen of the first count, and that by the finding of not guilty on that count the whole case against the accused failed, and the finding on the second count, therefore, could not be supported.

Remarks as to the form of the case reserved.

THIS was a case reserved by Winchester, Co.Ct.J., chairman of the general sessions of the peace for the county of York.

The accused was tried at the general sessions, before Winchester, Co.Ct.J., as chairman, and a jury, on an indictment laid under sec. 303 of the Criminal Code, R.S.C. 1906, ch. 146.

The indictment contained two counts.

The first count charged that Edgar M. Cook, at the city of Toronto, in the county of York, in or about the month of February, 1908, with intent thereby to procure the miscarriage of a certain woman, to wit, Lily M. Reid, then pregnant with child, did unlawfully use upon the person of the said Lily M. Reid an instrument, and did thereby commit an indictable offence, contrary to the provisions of the Criminal Code.

The second count charged that at the time and place aforesaid the said E. M. Cook, with intent thereby to procure the miscarriage of a certain woman, to wit, Lily M. Reid, then pregnant with child, did unlawfully operate on the said Lily M. Reid, and did thereby commit an indictable offence, contrary to the Criminal Code.

The jury found the accused not guilty on the first count, but guilty on the second count.

In the case reserved the county court Judge, after setting out the two counts as above, proceeded:—

“I have made the evidence and my charge to the jury part of the reserved case. My further directions to the jury, upon their request, and the exceptions of counsel for the prisoner, sufficiently appear from the shorthand report of the proceedings. After I had recalled the jury, and further advised them as to the two counts in the indictment, the jury returned with a verdict of not guilty on the first count and guilty on the second count.

“On the application of counsel for the prisoner, I have reserved for the consideration of the Court of Appeal for the Province of Ontario, pursuant to the provisions of the Criminal Code, the following questions of law arising upon the evidence.

“1. Was I right in admitting the evidence of Drs. Johnson and Cotton as witnesses in rebuttal upon the question of the girl’s pregnancy and as to the pain that would be produced by the use of an instrument, they not having been called as witnesses or not having given any evidence in chief?

“2. Was I right in charging the jury as I did with reference to the difference between the first and second counts of the indictment?

“3. Was I right in telling the jury, when they found that there was no proof of the use of an instrument, that there was evidence under which they might find the prisoner guilty under the second count of the indictment?

“4. Was I right in telling the jury that there was any evidence to support an attempt to procure an abortion, in distinction to the completed offence charged in the second count of the indictment?

“5. Was my charge to the jury or were any of the instructions that I gave to the jury, upon their being recalled, inaccurate in law?”

On November 16, 1908, the case was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

H. H. Dewart, K.C., for the prisoner. The evidence of Drs. Johnson and Cotton was improperly admitted. . This was evi-

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dence which should have been given in chief, and was not admissible in reply. The charge preferred was using an instrument during pregnancy, and evidence as to pregnancy was evidence which should have been given in chief. It was merely confirmatory of the evidence given in chief: Phipson on Evidence, 4th ed., p. 30. The charge of the learned Judge as to the difference between the first and second counts was erroneous. They were substantially the same. The whole aim of the Crown was to prove that an instrument, called a sound, had been used. No attempt was made by the Crown to shew that the act was committed or could be committed with the hand or the finger alone. The effect of the evidence for the Crown was to negative it, while the uncontradicted evidence for the defence shewed that this was impossible. The learned Judge erred also in directing the jury that the prisoner could be convicted for an attempt to procure an abortion. Intent does not in itself constitute an offence. It is merely an ingredient in the offence. The intent must be coupled with some overt act.

J. R. Cartwright, K.C., for the Crown. Looking at the evidence submitted by the Crown, the jury could properly find that an offence was committed apart from the use of an instrument. All the circumstances pointed to it: the taking of the girl to a maternity home; the amount of the fee paid; and the proprietress referring to what took place as an operation. The finding on the second count would clearly come within the meaning of the words contained in the section, "other means whatsoever," and this was the meaning the learned Judge gave to the word "operate" used in the second count. The accused could have asked for particulars, and his failure to do so left it open to the Crown to prove any offence which would come within the meaning of these words. The learned Judge was perfectly right in directing the jury that the intent was the important matter. The question is not whether an operation was actually performed, but whether there was the intent to do it. Then, as to the evidence of Drs. Johnson and Cotton, the admission of it was clearly in the discretion of the learned Judge.

Dewart, in reply. Had the second count charged, in the words of the statute, that other means were used, then particulars would have been asked for.

April 5. Moss, C.J.O.:—I have given to this case much time and attention, with the result that, no matter what I may think of the guilt or innocence of the accused, I feel compelled to the conclusion that his conviction under the second count of the indictment ought not to stand.

Much of the difficulty has been created by the form of the second count, and some by the form of the questions submitted.

The first count was well laid under the language of sec. 303, of the Criminal Code which enacts that “every one is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever with the like intent.”

The first count properly charged that the accused, with the intent specified in the section, did unlawfully use upon the person of the woman an instrument. The second count, instead of charging that the accused with the aforesaid intent did unlawfully use “other means,” leaving it to the prisoner by a demand of particulars to obtain a specific statement as to what the other means were, or forestalling such demand by specifying them in the first instance, either of which would have been proper, adopted language not in the section, and alleged that the accused unlawfully did “operate” on the woman. The word as there employed is equivocal. It does not necessarily carry with it a meaning suggestive of the employment of means other than an instrument, and the count might not unnaturally be regarded as a mere repetition in another form of the gravamen of the first count.

It is very apparent from the record that the minds of the counsel on both sides, the Judge and the jury, in fact all engaged in the trial, were bent upon the one inquiry, namely, whether, as charged in the first count, the accused did unlawfully use an instrument. The object of the Crown was to prove the possession and use by the accused of an instrument called a sound, which, if used in the manner spoken of upon the person of a pregnant woman, was very likely to cause miscarriage.

Indeed, the evidence for the prosecution was calculated to negative the use of the hand or finger alone as a means of procuring a miscarriage, and the effort was to demonstrate that the accused

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had and used the sound. The hand or finger would necessarily be used in making use of the sound.

There was no evidence upon which the jury as reasonable men could say that the accused had used means other than an instrument with the intent or for the purpose of procuring a miscarriage. The only evidence on this branch of the case was that it was not possible by the use of the hand or the finger to bring about a miscarriage at the stage of pregnancy at which it was said the woman was. The Crown witnesses did not contradict the evidence given on behalf of the accused on this point.

If, as the learned Judge thought, the word "operate" was the equivalent of "other means," the jury should have been instructed that the only other means pointed at by the Crown was the use of the hand or finger, and that unless they could find on the evidence that such use would procure a miscarriage they ought not to infer an intent on the part of a skilled professional man to procure it by such means.

And they should also have been instructed that there was no evidence on which they could find that fact.

And the jury having found the accused not guilty of the charge contained in the first count, having thus negatived the unlawful use of an instrument with the intent and for the purpose charged, the whole case against the accused practically failed.

Turning now to the questions, it is only necessary to say that if the first is one proper to be made the subject of a reserved case, it should be answered in the affirmative.

There are objections both as to form and substance in regard to some of the other questions, but, inasmuch as the answers are indicated in what I have said, and the conclusion on the whole case is that the conviction cannot stand, it is not necessary to here specify them in detail.

The conviction should be set aside.

GARROW, J.A., concurred with Moss, C.J.O.

MACLAREN, J.A.:—The accused was charged at the general sessions of York with an offence under sec. 303 of the Criminal Code, R.S.C. 1906, ch. 146. The indictment contained two counts: the first alleged that, with intent to procure the miscarriage of a certain woman then pregnant with child, he did un-

lawfully use upon her person an instrument; the second, that with the same intent he did unlawfully operate upon her.

The jury found the accused not guilty on the first count, but guilty on the second.

The learned Chairman reserved for this Court the five following questions:—[The learned Judge then set out the questions, and proceeded:]

The evidence and charge are made a part of the reserved case.

With regard to the first question, it is to be observed that the admission of evidence in rebuttal is largely in the discretion of the trial Judge. The evidence first referred to in this question might be admissible, on the ground that it was intended to rebut the evidence of the witnesses for the defence that the symptoms disclosed pointed to another cause than pregnancy. As the offence might be committed whether the woman was pregnant or not, this question was comparatively immaterial, and it cannot be said in any case that any substantial wrong was done by its admission. As to the second point, namely, the pain that would be produced by the use of an instrument, this appears to have been directed against the new evidence of the witnesses for the defence, that the use of an instrument as charged would necessarily have caused more pain than the chief Crown witness had testified to. But, inasmuch as the jury found the accused not guilty of having used an instrument as charged in the indictment, this question became wholly immaterial and need not now be dealt with.

With regard to the remaining questions and the indictment, it will be seen that the material parts of sec. 303 of the Code, under which the charge is laid, omitting the words relating to drugs, which are not relevant to this case, are, that every one is guilty "who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever with the like intent."

The crime aimed at is the attempt to procure a miscarriage. If a person, believing a woman to be with child, unlawfully uses on her an instrument or other means with intent to procure a miscarriage, the offence is complete, even though he should be mistaken and the fact be that she was not with child. Procuring an abortion is not the offence created by the section, but the attempt to procure it by the means named.

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It will be observed that in the second count the indictment does not adopt or use the language of the Code. Instead of charging the use of "other means," it is said that the accused "did unlawfully operate on her," which, strictly speaking, would cover the case of an instrument as well as any other means. It may, however, for the purpose of the present appeal, be assumed that the language used in the second count of the indictment is synonymous with that of the Code.

No particulars of this second count were asked for or furnished. The Crown did not bring out any evidence that would point to the finger of the accused, without an instrument, as having been the unlawful means used for the operation in question. The only suggestion during the progress of the Crown case that the doctor's finger may have been what was inserted came from the counsel for the defence, and the witness concurred in the suggestion.

In the course of a discussion, when one of the defendant's doctors was giving evidence, the same counsel made another reference to the use of the doctor's finger, and the presiding Judge corrected him by saying, "She did not say it was the doctor's finger."

In his main charge to the jury before they retired, the Judge did not in any way make the suggestion that the doctor's finger might have been used unlawfully. The whole case was apparently directed to the use of an instrument (called a sound), and the facts of pregnancy and a miscarriage pointed to as shewing that an abortion had not only been attempted but had been actually accomplished by this means.

The defence examined three doctors, and endeavoured to prove by them that it was perfectly proper, for the purpose of making an examination in order to ascertain the condition of the patient, for the doctor to insert his finger, as it was suggested he had done. They also swore that such insertion was quite harmless, and that in order to bring about the result testified to by the young woman something much smaller than a man's finger and not larger than a pen-handle or a sharpened pencil would be necessary.

The Crown examined two doctors in rebuttal, as already stated; but no question was asked or evidence given by either of them to contradict or rebut this evidence for the defence.

There being no evidence that the doctor's finger could have accomplished the unlawful object charged, can it be assumed

without some evidence that in this case a medical man used his finger with intent to accomplish something which the uncontradicted evidence states could not be accomplished in that way? No doubt a man might use means that could not possibly accomplish the unlawful object, and if it were proved that he used them with such intent he might be properly convicted.

As I have said, the issue throughout the trial was whether or not the accused had used with the intent charged an instrument which might have caused a miscarriage, and the charge of the trial Judge was directed to this issue. It was only after the jury had returned and intimated that they were not satisfied with the proof as to the use of an instrument that their attention was directed to the possible use of his finger for that purpose. I am of opinion that it was not regular to raise this new issue at that stage. The defence had endeavoured to meet the issue which the Crown had presented in its case, and I do not consider that it would have been proper for the Crown to have raised or presented a new issue in its reply; still less should such an issue be raised after the jury had expressed an opinion as to the case which had been presented to them in the evidence, addresses, and charge, and when the defence had no opportunity of meeting it by evidence or argument.

I am, therefore, of opinion that the remaining questions should be answered in harmony with the foregoing.

OSLER, J.A., concurred with MACLAREN, J.A.

MEREDITH, J.A.:—This case affords another of the frequently recurring instances which indicate a lack of appreciation of the character and form of a Crown case reserved, and of the jurisdiction of this Court in criminal cases, which a careful perusal of the sections of the Criminal Code—few in number—bearing upon the subject, ought alone to remove. If magistrates, Judges, and Courts, exercising the power conferred upon them, would bear in mind the two main points, namely, that jurisdiction in respect of reserved cases is limited to questions of law, and to such questions raised and stated in the manner prescribed by the Code, only, much that ought not to appear will cease to be, to the advantage, as well as to the credit, of all those who are concerned in this part of the administration of justice in criminal matters in this Province. No one should be unable to state the question or questions of law

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involved, in a distinct manner; and the facts, if any be necessary for the proper consideration of such question or questions of law, in a plain manner, without including anything that is immaterial: see *Regina v. Gibson* (1889), 16 O.R. 704. The fact that a copy of the whole evidence, or such part of it as may be material, may be sent to the Court of Appeal, is no reason or excuse for failing to state the case clearly and concisely, and assuredly none for ambiguity, or that sort of slovenliness which is really an attempt to "pitchfork" the whole case, and all the duties and responsibilities of the magistrate, Judge, or trial Court, over upon the Court of Appeal: that was not the purpose of permitting the evidence to be sent to that Court; and, it should be observed, that the copy of the evidence which may be so "sent" is not, and is not to be made, a substitute for, or part of, the case, but is something in addition to it. There should first be a clear perception of some definite question of law, material to the case, about which the magistrate, Judge, or Court, has some doubt; and, after that, its statement in an intelligible manner ought not to be very difficult.

The first question reserved in this case is not one such as is provided for in the Code; it relates merely to a mode of procedure at the trial, and is one of those matters which are in the discretion of a trial Court. It was not contended or suggested, upon the argument here, that the evidence in question was not material to the issue and properly admissible upon the trial; all that was complained of was that it was not given at that stage of the case when in strict regularity of procedure it might have been given. But it was quite within the power of the Court to allow the case for the Crown, or for the defence, to be reopened, at any stage of the trial, to admit further evidence, in the interest of justice. The result of admitting it in this case—if not strictly evidence in reply—was to reopen the case, so that the defence might also give further evidence if desired and possible. But no such evidence was offered; if it had been tendered and rejected, a different case would be presented.

I would answer this question by saying that whether the evidence, or any part of it, was or was not regularly, and strictly, evidence in reply, it was within the discretion of the Court to admit it at that stage of the trial; and therefore this point affords no ground for interfering with the conviction.

The second question is one which obviously should not have been stated as it is. Certainty, and proper form, required that the substance of the direction which was given to the jury should be stated, and that the question should be whether such direction was erroneous in some point of law. More than one perusal of the reporter's notes of the whole charge fails to make plain to me "the difference between the first and second counts," in regard to which this Court is asked whether the charge was right. No objection was, at the trial, made, to the form of either count, by any one; indeed, every one at the trial seems to have acted as if the two counts were understood and were unobjectionable, or else that every one was somewhat in ignorance as to their meaning, and deemed it wiser to avoid any attempt to make them plainer; a position which, in the prisoner's interests, may have been the wiser course; and it may be that such doubt accounts for the irregular and uncertain way in which the question is put. All that was said to the jury in the charge in the first place, or afterwards in answer to the jury's inquiry for light upon the meaning of the word "operate," was, at the most, very non-committal, of which, however, neither side can now very well complain, as neither sought, or gave, any assistance in elucidation of the point. But, as any elucidation of it would have made the case stronger against the prisoner, he can take no benefit from it now.

The section of the Code under which the prisoner was indicted is in these words: "303. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her any instrument or other means whatsoever with the like intent." These words very plainly comprehend two methods, (1) the *administration* of any drug or other noxious "thing," and (2) the *use* of "any instrument or other means whatsoever," with the intent made criminal. The first deals with the less direct means of accomplishing the end intended, that is, by drugs or "other noxious things," administered, as such things generally, though not necessarily, are, through the alimentary canal; the second, with the more direct means, that is, generally, but not necessarily, the use of something of the character of an instrument upon the

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womb. This enactment is taken word for word from the Imperial Act 1 Vict. ch. 85, or the enactment 24 & 25 Vict. ch. 100, sec. 58. In an earlier Imperial enactment the words were, "any medicine or other thing," and in a case in which the prisoner was charged with having administered a decoction of savin, Lawrence, J., is reported to have said that it was immaterial whether the drug was savin or not, or whether it was capable of causing an abortion, if the prisoner believed at the time that it would cause it, and administered it with that intent: *Rex v. Phillips* (1811), 3 Camp. 73, 76; and in a somewhat similar case, Vaughan, J., is reported to have said: "It is with the intention the jury have to do; and, if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient to constitute the offence contemplated by the Act of Parliament:" *Rex v. Coe* (1834), 6 C. & P. 403. The words there in question were very different from those contained in that part of the enactment now in question respecting the *administration*, which must now be of a "drug or other noxious thing;" but are very like that part of it relating to the *use* which may be made of "any instrument or other means whatsoever;" so that these two cases are very much in point here. Dr. Greaves's comments upon them, and upon the effect of the subsequent amendment of the enactment, in Russell on Crimes, 4th ed., vol. 3, p. 312, are very pertinent, and seem to me to deal with the subject with substantial accuracy; see also *Regina v. Hollis* (1873), 12 Cox C.C. 463; and *Commonwealth v. Snow* (1874), 116 Mass. 47. The cases of *Rex v. Phillips* and *Rex v. Cox* went very much further than is necessary in this case, and quite apart from any assistance they might give, it is plain that, under the enactment in question, it is not a necessary ingredient in the crime that the thing administered, or the means used, should be likely to cause, or indeed capable of causing, the effect intended; though of course the character of the thing administered, or the means used, may have a great bearing upon the essential question of fact, the intention of the accused. If the prisoner, an experienced physician, had administered bread pills, or used the "rest cure," only, he could hardly have been found guilty of intending to procure an abortion; he would hardly have been accused of the crime and tried upon that accusation. Ineffectual means, in the case of an unskilled person, might well be looked upon differently.

In the second count the means used were described as an operation. If the views of the learned Judges before referred to were right, it is not material whether the means actually used might be properly called an operation or not. But there was admittedly some manipulation of the private parts of the woman under the cover of a sheet, and I am unable to understand why manipulation, without the use of any instruments other than the hands, might not properly be called an operation. An operation in surgery is described, in the first dictionary that comes to my hand, as "an action done by a qualified person upon the human body with the hand, or by means of an instrument, with a view to heal or to bring about a normal state," though of course that definition does not nearly exhaust all the meanings which the word now properly conveys. The very origin of the word "surgeon" is two words, meaning hand work. As before mentioned, no objection was made to the form of the indictment, nor was any request made for particulars of the operation charged; nor was any objection made on the grounds of misdirection, or non-direction, as to the meaning of the word "operate." Nor does any difficulty seem to have arisen from the use of it. The prisoner, at the time when the crime is said to have been committed, had with him an instrument by which an abortion might have been caused; indeed, means sufficient in skilled hands are available anywhere. But the jury were not satisfied that that instrument was used; there was no direct evidence of the use of any other means than the prisoner's hands, and the jury may have found that his hands performed some operation with the criminal intent charged, or that he performed some other operation without an instrument, the character of which was concealed by him. The first count charging the use of an instrument, the second count must have been framed with a view to the other alternative, some "other means." To treat it as a mere echo of the first count seems to me to be impossible, being something never suggested until now; and something for which there could be no sort of reason, as well as being contrary to the conduct of everyone connected with the trial. If the second count stood alone, could it be said that it did not cover an operation by hand, as well as by an artificial instrument; and is the adding of another count, to broaden the scope of the indictment, to be now held to have more than half destroyed it?

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The result, too, would be unfortunate, leaving the prisoner open to another prosecution and trial, for an attempt to procure a miscarriage by any other means than the use of an instrument.

I am therefore unable to perceive how the prisoner can obtain any benefit from this question in whatever way this may be interpreted, or whatever it may mean.

The third question is perhaps even less excusable than either of the first two, and, since the case of *Rex v. Brown* (1908), 17 O.L.R. 197, is quite inexcusable. But if again it is to be treated as that which it is not, and that which this Court has no lawful power to convert it into, namely, a question whether there was any evidence to go to the jury, and is to be answered though there is no statement of what the evidence was, the answer, very plainly, I think, must be in the affirmative. The broad and unquestionable facts of the case alone contain evidence of the crime charged, which could not properly have been withheld from the jury. The circumstances under which the woman went to the "home" for treatment; the fact that it was ostensibly a private lying-in hospital—or, as now generally called, a maternity home—to which the woman was taken, though she was known to be only in the first stage of pregnancy, if pregnant; the fact that the prisoner was a practising physician, and also the landlord of the house; his proceeding at once to treat the woman, without inquiring as to the nature of her illness or need for medical or surgical treatment; the payment which was made to him, and that which it was sworn he said to the keeper of the house, that they would both get into trouble if it came out; and the fact that there was after, and apparently as the result of, his treatment of the woman, a discharge of some substance, whether a fœtus or a false membrane is not material upon this question, though of course very important upon the question for the jury whether the prisoner was guilty or not guilty of using means with intent to procure an abortion. The question which was presented to the jury, and upon which, on the whole evidence, they had to find, was whether the prisoner's treatment of the woman was really for suppressed menses, or was in truth to procure an abortion, and upon that question who can reasonably say that the verdict cannot be right?

To say that the whole trial was directed to the question whether an instrument was used seems to me to require the con-

centration of the mind upon one point, and an immaterial one, of the case, ignoring all that was most material, and upon which the jury evidently acted. The main feature of the trial seems to me to have been proof of the actual causing of an abortion by whatever means it was brought about; the evidence regarding the instrument being merely corroboration of the much more important main facts of the case to which I have briefly adverted. It seems to me very like a miscarriage of justice also if the prisoner should escape from the jury's reasonable findings merely because he did not use the "sound" to effect his purpose.

If I were dealing with this case alone, I would unhesitatingly decline to answer any of these questions, leaving it to the trial Court to present proper questions in a proper manner, if it really desire the assistance of this Court in removing any doubts which it really has upon any material question of law arising in the case; and, if not, then leaving it to the prisoner to appeal, after taking the steps necessary to entitle him to do so. But, if a majority of the Judges of this Court are of opinion that these questions should be answered, in my opinion they should, in that exigency, be answered in the way I have indicated.

The fifth question I decline, under any circumstance, to attempt to answer. The power of the trial Court is to reserve some definite question or questions of law. It is difficult for me to understand how, with any appreciation of, or regard for, this power, any such question as, "Was my charge to the jury inaccurate in law?" could be propounded. It would have been little, if any, more unreasonable and unjustifiable if the question had been, "Was there anything inaccurate in point of law throughout the trial?"

The provisions of the Criminal Code respecting reserved cases are few and plain, and are at least worth reading before professing to act under them.

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[IN THE COURT OF APPEAL.]

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May 13.

GOODISON THRESHER CO. v. TOWNSHIP OF McNAB.

Highway—Bridge—Duty of Municipality to Keep in Repair—Municipal Act, sec. 606—Collapse under Threshing Machine—Use of Traction Engines on Highways—R.S.O. 1897, ch. 242, sec. 10, and Amendments—"Ordinary Traffic"—Statutes—Imperative or Directory—Use of Planks to Strengthen Bridge—Condition Precedent—Liability for Injury to Bridge.

The duty imposed upon a municipality, by sec. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), of keeping its highways, inclusive of bridges and culverts, in repair, is, so far as relates to traction engines, subject to the requirements of sec. 10 of R.S.O. 1897, ch. 242, and the amendments thereto made by sec. 43 of 3 Edw. VII. ch. 7 (O.), and sec. 60 of 4 Edw. VII. ch. 10 (O.), whereby such engines, if of eight tons or over in weight, and not exceeding twenty tons, can only be run over a bridge or culvert subject to the condition that the owner must, at his own expense, first strengthen the bridge or culvert, and while so using them keep them in repair; but as to a threshing machine, if of less than eight tons in weight, the above obligation is not imposed; but the owner or person in charge is subjected to the obligation, which is imperative, and constitutes a condition precedent, that before crossing any such bridge or culvert he must lay down thereon planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine, etc., and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting therefrom to the flooring or surface of the bridge or culvert.

Where, therefore, the owner of a threshing machine under eight tons in weight, was in the act of drawing it across such a bridge, without having first put down planks, and though the bridge as constructed was not of sufficient strength to sustain the weight of the engine, but would have been had the boards been used, thereby diffusing the weight of the engine, and it fell through the bridge, damaging it, it was *held*, in an action brought by the owner of the machine against the municipality, that no liability was imposed on the municipality, but that the owner was liable to the municipality upon a counterclaim for the damage so sustained; Moss, C.J.O., and MEREDITH, J.A., dissenting.

Pattison v. Township of Wainfleet (1902), 1 O.W.R. 407, discussed. Judgments of ANGLIN, J., and a Divisional Court reversed.

THIS was an action brought by the plaintiffs, manufacturers of threshing outfits, to recover damages from the defendants by reason, as they alleged, of the defective condition of a bridge of the defendants over the river Madawaska in the defendants' township, the defects consisting, as was alleged, in the spans between the bents or supports being too long, and the stringers too light to support loads of permissible and ordinary weight on the bridge, and in that the stringers also were unsound and decayed.

The defendants denied all liability, asserting that the damage was occasioned through the omission of the plaintiffs, before attempting to use the bridge, to place thereon planks of sufficient

width and thickness to protect the bridge; and they counter-claimed damages by reason of the plaintiffs' alleged neglect in the premises.

The action was tried before ANGLIN, J., at Pembroke, on 24th and 25th April, 1908.

Peter White, K.C., for the plaintiffs.

W. R. White, K.C., for the defendants.

At the conclusion of the case the learned Judge delivered the following judgment.

April 25, 1908. ANGLIN, J.:—I do not think it is necessary for me to reserve judgment in this case. I have had an opportunity, during the presentation of the case, to consider carefully the various statutory provisions which seem to me to affect the matter, and I have now had the benefit of exhaustive arguments from counsel for both parties.

The obligation of the defendant municipality with regard to highways and bridges, and the maintenance and repair thereof, is to be found in sec. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.) By that section it is provided that "every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

The first question for consideration is, what is the extent of the obligation to maintain and repair imposed by this section of the statute. Were there no other statutory provision to be considered, I would be inclined to say and to hold that this statute requires the corporation to keep its roads, streets, and bridges in such condition that they can safely carry the traffic which may ordinarily be expected to be sent over them. But there are other statutory provisions affecting this matter, and these other statutory provisions must be looked at, when considering the force and effect and the purview of the provisions contained in sec. 606 of the Municipal Act. Now, one of these provisions is that which is found

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in R.S.O. 1897, ch. 242, sec. 1, which provides that it shall be lawful for any person to employ traction engines for the conveyance of freight and passengers, or both, over any public highway in this Province, subject to the provisions of this statute. When the statute was in the form in which it is to be found in the Revised Statutes, and before the amendments made in the years 1903 and 1904, the Courts of this Province, in the case of *Pattison v. Township of Wainfleet* (1902), 1 O.W.R. 407, referred to by Mr. White, counsel for the plaintiffs, took the view that engines used for threshing purposes are not within the purview of the statute because they are not engines for the conveyance of freight and passengers or both. The Courts further held that, although threshing engines were not within the purview of the statute, there was, nevertheless, an obligation on the part of municipalities, under sec. 606, to maintain the highway in condition for them to travel upon. By subsequent amendment the Legislature has apparently manifested its intention that traction engines used for threshing purposes—that is, engines capable of use for the conveyance of freight and passengers, but actually used as threshing engines—should be regarded as within the purview of the statute, ch. 242. That intention is evidenced by the amendment of 1903, contained in the statutes of that year, 3 Edw. VII. ch. 7, sec. 43 (O.), which adds, as sub-sec. 3 to sec. 10 of the revised statute, a short sub-section in these words: “The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roads.”

Section 10 of ch. 242, in the first sub-section, speaks of “such engines;” such engines, referring back to the earlier part of the statute, must be read as meaning traction engines for the conveyance of freight and passengers. The amendment excludes from sec. 10 engines used for threshing purposes. It was only necessary to exclude engines for threshing purposes if they would otherwise be within sec. 10, and the only proper inference, I think, to be drawn from the fact that the Legislature saw fit so expressly to exclude them is that the Legislature intended that the engines referred to in sec. 10, but for this exception, should be read and taken to include threshing engines. I do not understand that Mr. White, counsel for the defendants, differs at all from counsel for the plaintiffs in this view. On the contrary,

Mr. W. R. White's contention is that these threshing engines are within the purview of the statute, ch. 242, as now amended, and that in using the public highway they are subject to all the obligations, terms, and conditions imposed by that statute. We need not, therefore, dwell further upon the question whether they are or are not within ch. 242 and its amendments. Nevertheless, if the purpose of the legislation of 1903 was to render all the provisions of the statute applicable to such engines except sec. 10, one would have expected that result to be accomplished by direct legislation, rather than to be left merely to the inference to be drawn from the fact that an exception was made to the statute, which almost necessarily implies a declaration on the part of the Legislature that these engines are to be taken to be covered by the statute; yet this inference is so plain as to be practically irresistible. Now, the statute was further amended in the year 1904 by limiting the exception engrafted by the statute of the previous year, with the result that that exception no longer applies to engines of eight tons in weight or over. This was accomplished by adding to the section the words "of less than eight tons in weight." At the same time a proviso was added to sec. 10, which proviso will be found in sec. 60, of ch. 10, 4 Edw. VII. (O.) That proviso, although counsel for the defendants argued otherwise, in my opinion extends to and affects all of the sub-sections of sec. 10: that is, sub-secs. 1, 2, and 3. I do not see how any other construction can be put upon it. If there were any doubt about the matter, the language of sub-sec. 3 itself makes it quite clear, because sub-sec. 3 refers to the two preceding sub-sections, namely, 1 and 2. Then when we find in the proviso a reference to "any of the sub-sections of this section," we must certainly read that as referring to the whole three sub-sections which precede the proviso. That being so, it is perfectly clear that, whatever the construction of that proviso should be, it applies to all engines mentioned in sec. 10 of the revised statute, and therefore, of course, applies to the engine with which we are dealing in this particular case. Apart from the statute, the use of highways by threshing engines appears to be lawful, upon the authority of *Pattison v. Township of Wainfleet*, 1 O.W.R. 407. If they are taken to be within the statute, the first section of the Act expressly makes it lawful to drive them over the highways.

Before proceeding further with the disposition of this case,

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it is probably advisable that I should make some findings of fact upon the evidence.

I find, in the first place, that the engine with which we are here dealing did not exceed eight tons in weight. Its actual weight was approximately seven tons.

I find upon the uncontradicted evidence that the engine was carefully and properly driven upon and over the bridge, so far as it went over the bridge.

I find that there was no breach by the persons in charge of the engine of any duty incumbent upon them in regard to the driving of the engine over the bridge, unless, perhaps, a duty imposed by a proviso introduced by the amendment of 1904, in regard to the placing of planks upon the bridge before running the engine over it, as to which I shall have something to say at a later stage.

I find that the bridge was well constructed; that the wood used in it was good of its kind; that it was free from fault, so far as it was possible by proper inspection to secure that it should be free from fault.

I find that the bridge as constructed was adequate and sufficient for all ordinary traffic then passing over the highway of which the bridge formed a part, or for which the persons constructing the bridge and in charge of the construction at that time had any reason to expect it would be likely to be used during its ordinary life. I find that the bridge was good of its class.

Now, the burden in this case to shew that damage was sustained by reason of non-repair—that is, by reason of default under sec. 606 of the Municipal Act—is upon the person alleging that damage was so sustained: that is, in this case, upon the plaintiffs. The plaintiffs, therefore, must prove, not only that they sustained damage, but they must also prove that that damage was due to non-repair, and, therefore, that there was non-repair in fact within the meaning of sec. 606.

Upon the evidence before me, some given on behalf of the plaintiffs, indicating that there was at least one rotten or defective timber in the bridge, other, on behalf of the defendants, indicating that careful examination failed to disclose any such rotten or defective timber—upon the evidence, taken as a whole, I am unable to find that the plaintiffs have established that there was rotten or defective timber in the bridge. The burden was

upon the plaintiffs to prove that, and I content myself with stating that upon the whole evidence it has not been proved.

I find that the specifications originally prescribed for this bridge by Mr. Morris, the designing engineer, were altered; that they were altered by the council of the defendant corporation; and that the alteration consisted in the substitution of cedar for pine in the cross beams and in the stringers or furring. Although some evidence was given of difficulty in procuring suitable pine timber at the time this bridge was built, that evidence fell far short of what would be enough to justify the substitution of cedar, if, thereby, the carrying capacity of the bridge was rendered insufficient and the safety of its use for all lawful traffic doubtful or uncertain.

I cannot, upon the evidence, find that after this substitution had been made, and when the bridge was being constructed, the cross beams were placed at any less intervals than those indicated upon the original plan; that is, at intervals of three feet—what are called, in engineering parlance, three-foot centres.

I find, upon the evidence, that the strength of cedar is less than that of pine in the ratio of five to nine.

I find, upon the whole evidence of the engineers, that it would not be unreasonable to take four as a factor of safety, having regard to the purposes for which this bridge was intended at the time it was constructed. The evidence varies, the minimum factor of safety being stated by Mr. Morris to be three, he himself stating that in fact, when designing the bridge, he employed a safety factor of six. Moore and Bell, the engineers for the other parties, both say that five is, in their opinion, the least safety factor that ought to be employed in such construction. Having regard, however, to the purposes for which the bridge was intended, and to the fact that at the time it was built no such use as that now made of it was contemplated, I think that four would not be too low a safety factor to be reasonable.

I find that the cross beams, six by ten, were probably sufficient to have carried this engine over in safety, provided that the superstructure imposed upon them was of such a character that the weight of the engine would be distributed over five beams; upon the whole evidence, it was necessary that it should be so distributed in order that it might be safely carried. The reason, I find, that the beams were probably adequate is that upon the whole engineer-

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ing evidence, with a factor of safety of four, five beams would be capable of carrying the distributed weight of upwards of seven tons. While differing very decidedly as to the minimum legitimate factor of safety, the engineers are in accord as to the carrying capacity of the cedar beams used, upon the assumption of theoretical perfection; they agree that the five cedar beams over which the weight of this engine would have been distributed, if the stringers were sufficient, would, with theoretical perfection, have been capable of carrying $28\frac{1}{2}$ tons. Using the safety factor of four, these beams might have been depended upon to carry seven and one-twelfth tons, the total weight of the engine and appliances, including water and fuel, being about seven tons, as deposed to by Mr. Goodison. Then the question comes as to whether the stringers or longitudinal furring provided in this case were adequate. Not only must the stringers be so arranged that they will distribute over at least five cross beams the weight of the seven tons to be carried—because less than five beams would not suffice to sustain that weight—but the stringers themselves must be adequate and of sufficient strength to bear the weight and strain of the engine when passing between the beams.

Upon the whole evidence I would reach the conclusion that the weight to be sustained by the stringers between the beams would be at least two tons, and probably two and one-third tons. According to the evidence of Mr. Goodison, there would be about 8,000 pounds upon the rear wheels; that is, 4,000 pounds upon each, or two tons. According to the evidence of Potter, the other man who spoke upon the subject, the ratio between the weight borne by the front wheels and the rear wheels would be as two to four; that is, one-third upon the front and two-thirds upon the rear. But Potter had no personal experience of the Goodison engine, and was speaking with regard to his own engine of different make. Accepting Goodison's figures as correct, therefore, they being the most favourable to the defendants, there would be a weight of at least two tons thrown upon each stringer over which a rear wheel was passing. Now Mr. Morris's evidence is that with perfection, theoretical perfection, the breaking strain of the stringer used in this construction of four by six cedar laid flat with supporting beam, centres two feet six apart, would be 12,000 pounds; that is, six tons. Mr. Morris further

states that in his opinion the minimum safety factor which can be used in connection with these stringers would be three. The other engineers say the safety factor ought to be greater. But, taking it at three, the result would be that two tons would be a breaking strain upon each one of these stringers. Now, there was at least two tons weight to be carried. Mr. Morris said that a slight portion of that weight, something less than a third of a ton, 350 pounds, he said, would be taken off by the side stringer. If we accept it as established that the centres were two feet six apart, the proposition might be made out that the stringers were adequate to carry the weight; but the fact, as I must find it, is that it is not established that the stringers were two feet six apart, but, on the contrary, as sworn to by Mr. McGregor, the inspector who looked after the bridge construction, the original design—that is, the design shewn by Mr. Morris's plan, that is with three-foot centres—was actually carried out. It is true that in some portions of the bridge there have been found since this accident beams with only two feet seven and two feet six centres, but, in the absence of evidence to the contrary as to this particular part, I am unable to find that that was the case here. It may be there were two feet six and two feet seven centres at some portions of the structure, but I think it must be taken as reasonably well established that there were three-foot centres, or approximately three-foot centres, at other points. That being so, the breaking point would be considerably less than one-third of 12,000 pounds, considerably less than the two tons, using the safety factor of three. The result is that the stringers were apparently inadequate to carry between the beams the weight that would come upon them from the rear wheels of this engine. Mr. Morris says that he can only account for what happened to the bridge, having regard to the character of the structure, by disrepair or shock. There is no evidence of shock in the sense in which Mr. Morris uses the term; that is, of violent impact of the engine, or of undue speed in driving. I find the evidence insufficient to establish that there was disrepair in the sense of deterioration or rotting, or that there was defective wood in the portions which gave way. If it were clear that the construction of the bridge were such that it was certainly adequate to carry the weight, I might be driven to Mr. Morris's conclusion that what happened must be either the result of shock or of deterioration;

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but with the stringers inadequate, as I have found them, there is a satisfactory and sufficient explanation of the bridge giving way and of the engine going through, without my having to find that there was shock, which there is no evidence to warrant, or that there was improper driving, which is against the evidence, or that there was disrepair, which I do not think sufficiently established on the evidence.

It is in evidence that the engine in going down turned a somersault; that when found it was bottom upward; and that its position made it quite clear that the rear end of the engine went down first, and that it was in that way that it became turned over. This is quite consistent with the explanation offered by some of the defendants' own witnesses, that what probably took place was that the stringers gave way under the weight of the rear wheels; that, with the stringers giving way, the surface boards were unable to sustain the weight; that, as a result, the engine fell through these boards and stringers; and that, the engine coming with some degree of violence upon the beams, which would have been perhaps capable of carrying its dead weight, or its weight if moving slowly over them, the increased stress or strain put upon the beams by reason of the shock of the engine breaking through the stringers was more than they could stand, with the result that the whole structure gave way and went down.

Upon the evidence, I think I must find as a fact that the engine was driven over the bridge in such a way that the rear wheels came upon and over the stringers. There is no evidence of any breaking of the surface planks on either side of the stringers. If the engine wheels passed over the stringers there would not be a breaking of the surface boards; there would be rather a crushing of the boards, if, in fact, they were injured at all.

Upon the whole evidence, therefore, I find that the accident happened by reason of the stringers giving way under the weight of the rear wheels. As these gave way, the surface covering yielded—an instantaneous thing, and quite consistent with Mr. Heidrick having seen that which Messrs. Stewart and Fraser swear he told them he did see, namely, that the first evidence of breaking to his knowledge was the boards coming up or flying out. I think it quite likely that Heidrick did see that, and I find as a fact that he so told Messrs. Stewart and Fraser.

I accept their evidence, and I think the explanation of it is that which I have pointed out. Then, the stringers giving way, and the engine, consequently, breaking through the surface covering, its weight, as I have said, came as a shock upon and against the beams, throwing upon them a much greater strain and force than if the engine were standing still or moving slowly forward over the surface, probably imposing on the beams a strain equal to that which would be put upon them by a weight twice as great as that of the engine, or fourteen tons; and fourteen tons, I think it is conceded on all hands, these beams could not be relied upon to sustain. If, then, it was the duty of the municipality to provide a bridge which was adequate for this traffic, and if it was its duty to keep that bridge in proper and sufficient repair, the breach of that duty will render the municipality liable for damages under the statute. It is not a question of negligence; it is a question of statutory obligation imposed by sec. 606 of the Municipal Act, and a default in the discharge of that obligation—the result that which the statute specifies, namely, that the municipality shall be liable for damages sustained by any person by reason of such default.

It therefore becomes necessary to consider and determine whether or not the Legislature has imposed upon the municipalities the duty of providing a bridge adequate for this traffic. Now, sec. 606, as I have already stated, on its face would require the municipalities to provide for all ordinary traffic likely to be expected to pass over the bridge, which sec. 606 requires them to maintain and repair. In construing that section we must look at ch. 242. Chapter 242, in express terms, makes it lawful for persons employing traction engines, not exceeding twenty tons in weight, to take these engines over and along public highways—and public highways, of course, for that purpose, include bridges on such highways—subject only to the conditions prescribed in the statute. Now, these conditions, as contained in sec. 10, are that before it shall be lawful to run such engines over any highway it shall be the duty of the person proposing to run such an engine to strengthen, at his expense, all bridges or culverts. If the section stood in that way, it would be quite clear that the plaintiffs in this case, running this engine over the highway and over the bridge, would have been obliged, at their own expense, to strengthen the bridge and make it adequate to carry the engine, and that would certainly

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have been the position and the duty of these people had the statute remained as when first passed, if it were then applicable to them; but by amendment the Legislature in 1903 directed that this sec. 10, imposing the obligation of strengthening bridges, should not apply to engines used for threshing purposes. That being so, engines used for threshing purposes apparently had a right to travel upon these highways provided they were less than twenty tons in weight, without being obliged to strengthen the bridges at all. Then that was found apparently too onerous a provision, making the burden upon the municipalities too great; and the Legislature, to lessen that burden, further prescribed that the right to use the bridges without strengthening them should not exist, except in the case of engines less than eight tons in weight, and then only subject to the proviso which followed. Looking at the matter apart from the proviso, for the moment, it seems quite clear that the effect of the whole legislation is that there is no duty imposed upon persons using threshing engines, carrying them along the highways and over bridges, to repair bridges, to strengthen bridges, to make them fit to carry these engines, if they are less than eight tons in weight. The duty remains as it was before, where the engines exceed that weight. Here we are dealing with an engine under that weight. If the statute had stopped there, I think it quite plain that the use of the highway as it was here used would be clearly a lawful use, a use that the statute contemplated. The question is, does the fact that that use is made lawful impose upon the municipalities the duty of putting their bridges—if they are not already in condition to carry that load—the duty of putting them in such condition? Mr. White, for the defendants, argues that this imposes a very heavy obligation upon the municipalities. I agree, but I do not think it is a question whether the obligation is heavy or light. The question is, does the statute impose it? The statute makes the traffic lawful. The statute says that the bridges shall be maintained by the municipality in a good state of repair. Section 606, I think, contemplates that any traffic that the Legislature has in express terms declared to be lawful is traffic which the municipality is bound to provide for. That traffic is in this case extended to the case of engines used for threshing purposes, such as this was, not exceeding eight tons in weight. That being so, apart from

the proviso, there was on the part of the municipality a failure to provide a bridge adequate for the carrying of that engine. Although there was no negligence in the matter, in the sense in which negligence is ordinarily used, I must find that there was a failure on the part of the municipality to discharge its statutory duty. The Legislature having made the use of the highway lawful, I do not think the municipality can be heard to say that it was a use of the highway that they had no reason to anticipate. The fact that the traffic is made lawful imposes upon the municipality, by virtue of sec. 606, the obligation of maintaining its highways, including bridges, in a condition to carry such traffic with safety.

Mr. W. R. White argues that, because of the conditions imposed by the Legislature in the proviso, the plaintiffs cannot succeed in this action, not having complied with those conditions. That depends upon the construction which should be put upon the proviso contained in ch. 10 of the statutes of 1904, sec. 60. It is admitted that no planks were put down in conformity with that proviso. The proviso, however, is not absolute that planks shall be put down, but it is that the persons crossing the bridge shall lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary for the protection of the flooring or surface. Mr. White argues that the words "flooring or surface" are not interchangeable words; that "surface" means the planking upon the top, and that "flooring" includes what he calls the whole of the flooring system; that is, the substructure, so far as that substructure consists of beams and stringers supporting the planking on top. I am unable to agree with that construction of the statute. In my opinion the words "flooring or surface" are here interchangeable terms, and what is intended is not that the person using the bridge shall be liable to provide such planks as will adequately strengthen the substructure, consisting of beams and stringers, to permit of his using it, but that he will provide planks sufficient to protect the surface or flooring—that is, the plank covering on top—from injury likely to be caused by any projections on the wheels of the engines, such as creepers or mud corks. I think the whole provision, carefully considered, indicates that. If the duty to provide planks had been an absolute duty, a condition precedent to the right to use the bridge at all, there would be a great deal of force in Mr. White's argument; and I think that must have been the view

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taken of the statute, and those must have been the terms of the statute, in the Wisconsin case to which Mr. White referred. Then, not only does the statute say that the obligation to put down planks arises only where planks are required to protect the flooring surface, and that the obligation only exists to the extent to which such protection is required, but the statute goes on to provide that in default of so providing, the person in default shall be liable to the municipality for all damage resulting to the flooring or surface of the bridge or culvert, as aforesaid. Now, the damage here was not at all to the flooring or surface, in the sense in which I think flooring or surface is used, but to the substructure of the bridge. The fact that the consequences of a breach of the section are provided in the section itself, and are in that way limited, affords another argument for the construction which I have put upon the proviso, namely, that the obligation is limited in its purpose to the protection of the surface or flooring, in the sense in which "flooring" is, I think, used—does not extend beyond that—and that the breach of that obligation does not carry with it such consequences as counsel for the defendants maintains.

My view, therefore, is that; while the use of the planks by Jones when crossing the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety, it is not shewn that there was in fact any breach of the proviso, because it is not shewn that planks in this case were necessary for the protection of the surface or flooring of the bridge. It is not shewn that the flooring or surface of the bridge was injured by reason of planks not having been used. What is shewn is that the bridge gave way; but that, as I have pointed out, was, in my opinion, due to a defect in the stringers below the planks, and I think the planks themselves gave way only because the stringers failed to support them.

Upon the whole case, therefore, I think there must be judgment for the plaintiffs, and the question of damages only remains to be considered. The plaintiffs' claim is somewhat large in their pleadings; but, upon the evidence, the claim is put at \$750.20 for cost of repairs to the engine, \$68 for freight charges transporting the engine from Renfrew to Sarnia, and \$64, the cost of raising the engine from the water and of bringing it in to Renfrew. With regard to the first item, in answer to questions put by myself, Mr. Goodison

frankly admitted that there was probably 20 per cent. profit included in that, that the \$750 did not represent the actual cost of the repairs, but that it was made up upon a basis which carried in it a certain amount of profit, which is estimated at 20 per cent. While I do not think it right to hold persons in the position of these plaintiffs down to the actual cost, I think, in the circumstances of this case, that 10 per cent. should be sufficient profit to allow. I therefore deduct from \$750.20 the sum of \$75.02, leaving \$675.18. In addition to that I allow \$68 freight, and \$64 expense of raising the engine and bringing it to Renfrew, making a total of \$807.18.

In the event of this case going further, and an appellate Court taking a different view as to the rights of the parties, I would assess damages to the defendants under their counterclaim at the sum of \$77.80, being the total sworn to by the reeve of the township. He gave evidence of items covering \$74.80, and McGregor gave evidence of a \$3 payment to one McLeod.

Judgment for plaintiffs for \$807.18 with costs, and dismissing the counterclaim with costs, with the usual stay.

From this judgment the defendants appealed to a Divisional Court.

On June 15th, 1908, the appeal was heard before FALCONBRIDGE, C.J.K.B., MACMAHON and RIDDELL, JJ.

W. R. White, K.C., and *W. M. Douglas*, K.C., for the appellants.
T. C. Robinette, K.C., for the respondents.

On June 16th, 1908, the Court delivered judgment dismissing the appeal with costs.

From this judgment the defendants, by leave of a Judge of the Court of Appeal, appealed to that Court.

On February 12th, 1909, the appeal was heard before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. R. White, K.C., and *W. M. Douglas*, K.C., for the appellants. Under sec. 10 of R.S.O. 1897, ch. 242, as amended by sec. 43 of 3 Edw. VII. ch. 7 (O.) and sec. 60 of 4 Edw. VII. ch. 10 (O.), the plaintiff could only use the bridge subject to the condition of putting down the planks. The words used, "flooring or surface," are not used interchangeably; their meaning is clearly distinct. The word "flooring" refers to all that pertains to make

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the floor, namely, the superstructure, consisting of the beams and stringers to support the planks on top of them, while the word "surface" is limited to the top planking. In the Imperial Dictionary, tit., "floor, flooring," these words are defined as referring to the whole construction used in making the floor. If it had been intended to limit the meaning to the surface merely, the statute would have said so, and the mere fact of the requirement to use planks of sufficient thickness shews that more than the surface was intended. The statute would not have required planks when some other material, like felt or linoleum, would have done just as well and would have been more convenient to carry. So far as the bridge itself was concerned, it was properly constructed, and it is established on the evidence that, had the planks been used, their effect would have been to so distribute the weight of the engine as to prevent the happening of the accident. The plaintiffs, by the omission to use the planks, were illegally on the bridge. It is immaterial whether you term the plaintiffs' act contributory negligence or breach of the statutory requirement: *Hardcastle on Statutes* (Craies), 4th ed., p. 230, and cases there cited: *Forster v. Taylor* (1834), 5 B. & Ad. 887, 895; *Heland v. City of Lowell* (1862), 3 Allen (Mass.), 407; *Bosworth v. Inhabitants of Swansey* (1845), 10 Met. 363; *Welch v. Town of Geneva* (1901), 110 Wis. 388.

J. M. Godfrey, for the respondents. Under the statute it is quite clear that in the first place there must be an effective bridge, that is, a bridge capable of supporting an engine, such as the one here, under eight tons in weight, and the bridge must be kept in repair by the municipality. The whole question is, was the requirement to put down planks a condition precedent to go over the bridge? The statute does not say you must not cross the bridge until you have put down planks; all it says is that before crossing the bridge it shall be the duty of the person or persons proposing to run the engine over it to lay down on the bridge planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of the bridge from any injury that might otherwise result thereto from the contact of the wheels of such engine. The words "flooring or surface" are, as the learned trial Judge found, used interchangeably. The object of the provision was to provide for the case

of corked wheels, which would necessarily cut up the surface, but not to impose any duty on the persons so using the bridge to make it strong enough for the required purpose. The defendants' contention amounts to this, that, notwithstanding the fact that they have not built the bridge strong enough to support an engine such as the plaintiffs', they are relieved from liability unless the plaintiffs do something to strengthen it. The requirement was merely directory: *Beckford v. Hood* (1798), 7 T.R. 620; *Davidson v. Garrett* (1899), 30 O.R. 653; *Hardcastle on Statutes* (Craies), 4th ed., p. 237; *Heath v. Hubbard* (1803), 4 East 110; *Sussex Peerage Case* (1844), 11 Cl. & F. 85, 148.

May 13, 1909. Moss, C.J.O.:—This was an appeal by the defendants from a judgment of a Divisional Court affirming a judgment in favour of the plaintiffs entered by Anglin, J., at the trial.

The facts as found by the learned Judge are not now in dispute. The evidence has not been submitted to us, and for the purpose of this appeal we are to consider the case upon the facts as stated by the learned Judge in his reasons for judgment.

While a traction engine, the property of the plaintiffs, was crossing a bridge which the defendants had erected over the Mada-waska river where it crosses a highway within the defendants' territorial jurisdiction, the bridge gave way and the engine fell to the river and was greatly damaged. The action is to recover the loss and damage to which the plaintiffs were put by reason of the accident.

The engine was less than seven tons in weight, and it is not claimed that there was any negligence on the part of the plaintiffs' men in charge of it, unless the failure to lay planks on the floor of the bridge, to be referred to later, is to be treated as negligence.

The learned Judge found that the breaking down of the bridge was due to defective construction, both as to design and strength of materials. As originally designed, the cross beams and stringers were to be of pine, the stringers placed at three-feet centres. But the plans and specifications of the designing engineer were altered by the council of the defendant corporation by the substitution of cedar for pine in the cross beams and stringers. The strength of cedar being less than that of pine in the ratio of five to nine, it followed that the carrying capacity was weakened, and in order

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to remedy this the stringers should have been laid at not more than $2\frac{1}{2}$ -feet centres, whereas they were laid as in the original design at three-feet centres. The result was that the stringers were inadequate to safely and properly sustain the weight imposed upon them by traffic such as the traction engine in question, and, as the learned Judge observed, "with the stringers inadequate, as I have found them, there is a satisfactory and sufficient explanation of the bridge giving way and of the engine going through, without my having to find that there was shock, which there is no evidence to warrant, or that there was improper driving, which is against the evidence, or that there was disrepair, which I do not think sufficiently established on the evidence."

There was, therefore, original structural defect and failure on the part of the defendants to provide a safe means of passage of this seven-ton traction engine over the stream crossing the highway upon which it was travelling. It was scarcely suggested that the passing of traction engines of the nature and weight of the one in question upon and along the highways of the municipality can be regarded as an unusual and extraordinary user. It is common knowledge, and it has been recognized by legislation, that engines of the kind in connection with travelling threshing machines are in common use among the farmers in the settled districts of the Province.

From the course of the legislation on the subject there is a fair implication that the use by traction engines of the class to which this particular engine belongs, of the highways of municipalities, is recognized and justified; and it cannot be said that such user is not part of the ordinary and usual traffic upon and over such highways, and that it is not the duty of the municipalities to make proper provision for it.

By the Act 31 Viet. ch. 34 (O.), reciting that it is expedient to encourage the introduction of traction engines into this Province and to regulate their use and operation, it was made lawful for any person to employ traction engines for the conveyance of freight and passengers or both over any public highway in the Province, provided they did not exceed twenty tons in weight, and provided, as to the use of bridges, that before it should be lawful to run such engine over any highway it should be the duty of the person proposing to run the same to strengthen at his own expense all bridges

and culverts to be crossed by such engine, and to keep the same in repair so long as the highway was so used.

These provisions, with others contained in the Act, were carried through, and re-enacted in substance by, the respective revisions of 1877 (ch. 186), 1887 (ch. 200), and 1897 (ch. 242).

If the decision in the case of *Pattison v. Township of Wainfleet*, 1 O.W.R. 407, be accepted as an interpretation of the sense in which the words "traction engine" were used by the Legislature, it would seem that they did not include engines for threshing purposes, and that, notwithstanding the provision requiring persons using traction engines to strengthen bridges before running them on the highway, there was an obligation on a municipality, under the Municipal Act, to provide bridges sufficiently strong to enable engines used for threshing purposes to use and cross them in safety.

The general understanding of the meaning of the term "traction engine" is that it is a name given to a locomotive used for drawing waggons along a highway, which would ordinarily apply to an engine moving a threshing machine or separator along the highway from one farm to another. And probably the decision in *Pattison v. Township of Wainfleet* should be regarded as turning upon the special facts in evidence in the case.

However that may be, the Legislature in 1903 made it apparent that the cases of engines used for threshing purposes, or for machinery in construction of roadways, were not to be in the same category with other traction engines, for by 3 Edw. VII. ch. 7, sec. 43 (O.), it was enacted that the conditions with regard to strengthening bridges imposed by R.S.O. 1907, ch. 242, sec. 10, should not apply to engines used for threshing purposes or for machinery in construction of roadways. This extensive privilege, which relieved the owners or persons using engines of the description referred to from the obligation to strengthen bridges, at their own expense, without reference to the weight of the engines, provided they did not exceed twenty tons, was modified in the following year by restricting it to engines of less than eight tons in weight: 4 Edw. VII. ch. 10, sec. 60 (O.) A further addition made by the same sec. 60 will be considered later on; but, apart from it, and any obligation it imposes, the effect of the legislation has been to free the owners or persons using on the highway engines for threshing purposes of less than

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eight tons in weight from any obligation to strengthen the bridges or culverts to be crossed by them.

And as to engines answering that description, the municipalities are bound to provide bridges sufficient in strength and carrying power to enable such engines to pass over them in safety.

The bridge in question here having been found insufficient to sustain the weight of the plaintiffs' threshing engine of seven tons in weight, the defendants' responsibility for the consequent damage and loss is plain, unless they are exonerated by reason of the further provision appended by 4 Edw. VII. ch. 10, sec. 60.

It may be well to set forth the whole of the provisions as they stand in the statute books.

Section 10 of R.S.O. 1897, ch. 242, as amended, now reads as follows:—

"10.—(1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engine, and to keep the same in repair so long as the highway is so used.

"(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts: R.S.O. 1887, ch. 200, sec. 10.

"(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided however that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge or culvert as aforesaid": 3 Edw. VII. ch. 7, sec. 43 (O.); 4 Edw. VII. ch. 10, sec. 60 (O.)

It appears that before entering upon the bridge with the engine the men in charge of it did not lay down any planks to protect the

flooring or surface of the bridge from the contact of the wheels, but it was not shewn that planks in this case were necessary for the protection of the surface or flooring, nor that the flooring or surface was injured by reason of planks not having been used.

But the defendants nevertheless contend that the condition contained in the last sentence of sub-sec. 3, above quoted, is absolute in every case; that, although the wheels may be wholly free from corks or roughness of surface, or anything tending to injure the flooring or surface of the bridge, the direction as to planking must nevertheless be observed; otherwise the municipality is freed from responsibility for the consequences of its failure to construct and provide a bridge of sufficient strength and carrying power to sustain the weight of an engine for threshing purposes though less than eight tons in weight.

I am unable to so read the provision. I agree with Mr. Justice Anglin's view as to the meaning of the words "flooring or surface"—that they mean the plank covering on top. I also agree with him that what is intended is not that the person using the bridge shall be bound to provide such planks as will adequately strengthen the substructure—the beams and stringers—so as to render the bridge fit to bear the weight of the engine. His obligation is to provide planks in case the construction of the surface of the wheels is such as to produce injury to the surface of the flooring by contact with it. It surely could never have been the intention of the Legislature that an engineer building a bridge should, in estimating what was necessary in order to provide sufficient strength and carrying power, take into consideration the possibility of the wheels of an engine calling for the placing of planks under them to prevent their injuring the surface of the flooring, and consider that as a factor in determining the structural design of, and the sort of materials to be used in the construction. The strength and sufficiency of a bridge should not be made to depend upon the judgment of a man in charge of a threshing engine as to the sufficiency of the width and thickness of planks necessary to protect the flooring or surface from injury from the contact of the wheels. †

The object and intention of the provision appears to me to be plainly expressed, and I am unable to gather from it any general prohibition against entry upon a bridge with an engine without

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first laying planks under the wheels. As I read it, the prohibition is confined to cases where the wheels would be likely to injure the flooring, in which case, if default is made and injury results, the person in charge and his employer are liable to the municipality for the damage resulting to the flooring or surface.

The circumstances of this case did not call for the laying of such planks, and according to the learned Judge's finding it was not the want of them to which the breaking down of the bridge was attributable, although he does, it is true, express the view that the use of planks would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety.

That might have been the case, but it would depend upon the width and thickness of the planks, and that would rest in the judgment of the person in charge of the engine; and exemption from the duty of providing a proper and safe bridge ought to rest on broader grounds than these.

In the case of *Welch v. Town of Geneva*, 110 Wis. 388, the liability for all damages was by the statute law placed directly upon the owner or person in charge in case of failure to span any bridge or culvert, before crossing the same, with planks of a specified thickness, width, and length—a very different provision from that in question here.

But, even under that law, it has been held that the owner could recover, although there was a failure to plank a bridge as provided, where it was a fair inference that there was no causal relation between the failure to properly plank and the accident which happened: *Walker v. Village of Ontario* (1901), 86 N.W. Rep. 566. For the ultimate result in that case see 95 N.W. Rep. 1086 (1903).

I think the judgment of Mr. Justice Anglin, affirmed as it was by the Divisional Court, should be sustained, and that the appeal should be dismissed.

OSLER, J.A.:—In my opinion this appeal should succeed.

The inference to be drawn from sec. 43 of 3 Edw. VII. ch. 7 (O.), and sec. 60 of 4 Edw. VII. ch. 10 (O.), by which a third subsection was added to sec. 10 of the Municipal Act, R.S.O. 1897, ch. 242, "An Act to Regulate the Use of Traction Engines on

Highways," is that a threshing engine of less than eight tons in weight is a traction engine within the meaning of that Act, and, therefore, may be lawfully used and employed upon an ordinary public highway, subject, as provided in sec. 1, to the provisions of the Act. But, inasmuch as sub-secs. 1 and 2 of sec. 10 of that Act were by the amending Acts above referred to made inapplicable to such an engine, the plaintiffs, though having the right, subject to other provisions of the Act, to use the defendants' bridge for the purpose, were under no obligation to strengthen it before running their engine over it. For traffic of that kind the defendants' obligation was that imposed by sec. 606 of the Municipal Act so far as the strength and carrying or supporting power of the bridge was concerned, and the bridge ought to be strong enough to bear the weight of such an engine. That, in my opinion, is the proper inference to be drawn from the existence of the statutory right to run such an engine over the bridge, freed from any obligation to strengthen it before doing so. The question then is, what is the effect of the proviso added to sub-sec. 3 of sec. 10, by sec. 60 of 4 Edw. VII. ch. 10, "that before crossing any such bridge . . . it shall be the duty of the person . . . proposing to run any engine . . . mentioned in any of the sub-sections of this sub-section," sec. 10, "to lay down on such bridge . . . planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge from any injury that might otherwise result thereto from the contact of the wheels of such engine . . . ; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge?"

The words "flooring" and "surface" are convertible terms, and in contrast with the structure of the bridge, or the bridge itself, regarded as a part of the highway. The object is to prevent the flooring or surface from being injured from the contact therewith of the wheels of the engine, not to strengthen the bridge as a carrying structure against the weight of the engine, as the proviso applies to every engine mentioned in the section, as well to those in respect of which the bridge is required to be strengthened, as to those in respect of which there is no such obligation.

But, although the engine may be so constructed that it would

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pass without doing damage or would be unlikely to do damage to the flooring, and although the primary object of the proviso is to prevent such damage, I do not think we are at liberty to disregard its plain enacting words, that before crossing any such bridge it shall be the duty of the person proposing to run the engine to lay down planks, etc.

The right to run the engine at all upon the public highway is subject to the provisions of the Act, one of which is found in the proviso in question, and, in the absence of compliance with its requirements, I do not see how it can be said that the engine was lawfully on the bridge. The penalty is not merely the payment for damage done. The owner of the engine has no right to take his chances and to assert exemption if no damage has been done. He is liable to be penalized under sec. 10 for having gone upon the bridge without the right to do so. He was contravening the provisions of the Act, and, in my opinion, cannot allege that while doing so the defendants were under any legal duty towards him in respect of the maintenance and construction of the bridge.

I would allow the appeal; and agree with what my brother Garrow has said as to the defendants' right to judgment on the counterclaim.

GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court, affirming the judgment at the trial of Anglin, J., in favour of the plaintiffs, for \$807.18.

The action was brought to recover damages for negligence on the part of the defendants in the maintenance of a bridge over the Madawaska river in the township of McNab, which broke down when the plaintiffs were engaged in drawing a traction engine used for threshing purposes over it, letting the engine through to the water and considerably injuring it.

The defendants, besides defending, also counterclaimed, claiming damages for the injury to the bridge.

The statutory duty to repair and maintain highways imposed by sec. 606 of the Consolidated Municipal Act, 1903, extends to all ordinary traffic. Whether "ordinary traffic" would, under any circumstances, by itself include a threshing engine when being used upon a highway as a traction engine, and weighing seven tons, may be a question. In my opinion, it would not, but it is not necessary

in this case absolutely to determine the point, which apparently wholly turns, as was held by Anglin, J., upon the proper construction to be placed upon the statute specifically applicable to the subject, namely, R.S.O. 1897, ch. 242, entitled "An Act to Authorize and Regulate the use of Traction Engines on Highways," and amendments thereto by 3 Edw. VII. ch. 7, sec. 43 (O.), and 4 Edw. VII. ch. 10, sec. 60 (O.)

Under the first or main statute, traction engines not exceeding twenty tons in weight, used for the conveyance of passengers or freight, or both, were authorized to use a highway, but, by sec. 10, sub-secs. 1 and 2, only upon condition that before doing so the owner, at his own expense, should first strengthen the bridges and culverts over which he intended to pass, and should afterwards, while so using the highway, keep them in repair.

It is not quite clear that the terms originally used were intended to include a traction engine used for threshing purposes, although I see no difficulty in so construing the language, especially if the engine is used, as they usually are, to pull after it the threshing machine outfit. It would be hard to distinguish such an engine from any other traction engine used to pull other freight. In *Pattison v. Township of Wainfleet*, reported only, I think, in 1 O.W.R. 407, a Divisional Court affirmed a judgment of a county court, in which it had been held that the threshing machine engine there in question was not a traction engine within the meaning of that term in R.S.O. 1897, ch. 242. But that conclusion was reached, as the judgment shews, entirely as a question of fact upon the evidence, and laid down no general principle. *Pattison v. Township of Wainfleet* was decided in 1902. In 1903 the Legislature clearly indicated its opinion that such engines, when used for threshing purposes, were intended to be included in the earlier Act, by passing the statute before referred to, of 3 Edw. VII. ch. 7, sec. 43 (O.), whereby sec. 10 of R.S.O. 1897, ch. 242, was amended by declaring that sub-secs. 1 and 2 of that section should not apply to "engines used for threshing purposes or for machinery in construction of roadways." The effect of this amendment was to authorize traction engines, when used for threshing purposes, up to twenty tons in weight, to use the highway, apparently unconditionally. This, however, would not necessarily have had the effect of making

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such engines "ordinary traffic" for which municipalities would have been compelled to make provision.

But in the next year a restrictive amendment was passed, namely, 4 Edw. VII. ch. 10, sec. 60 (O.), which limited the weight of such threshing engines to less than eight tons, and added the following important proviso:—

"Provided however that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting to the flooring or surface of such bridge or culvert as aforesaid."

The effect of the whole legislation is that traction engines, including those used for threshing purposes, if of eight tons or over in weight, can only use the highway subject to the conditions imposed by sec. 10 of R.S.O. 1897, ch. 242, but, if of less than eight tons in weight, a threshing engine may use the highway without the obligations imposed by that section, but is subject to the new obligation of laying planks as provided in the before quoted proviso; while other traction engines, even if of less weight than eight tons, would be subject to the provisions of sec. 10, sub-secs. 1 and 2, of the original Act.

Anglin, J., found as facts that the bridge was a good bridge of its class, well constructed and in good repair, and capable of safely carrying all ordinary traffic, but insufficient to bear the engine in question, which he found was about seven tons in weight; that no planks had been laid as required by the statute; and that, had the statute been complied with, the effect would have been not merely to protect the surface of the bridge but to have so added to the sustaining power of the stringers that they would have carried the engine over in safety; in other words, the accident would not have occurred. He held as matter of law, upon the construction of the legislation to which I have referred, that the defendants were bound to provide a bridge sufficient to bear a threshing engine of less

than eight tons in weight; that it was not a condition precedent to using the bridge to lay the planks, and that the failure to do so did not stand in the way of a recovery; and that, while there had been no negligence on the part of the defendants in the ordinary sense, the plaintiffs were nevertheless entitled to recover by reason of the defendants' failure to comply with the statutory duty imposed by sec. 606 of the Consolidated Municipal Act, 1903.

I agree that the primary object of the proviso was apparently to protect the surface of the bridge, and not to strengthen the sub-structure. But that, it seems to me, advances one but very little towards a proper solution of the somewhat novel questions involved.

If, instead of being a threshing engine, it had been an ordinary traction engine of the same weight, or if it had been a threshing engine of over eight tons in weight, it could not be successfully disputed that before crossing the owner must have complied with sec. 10, sub-secs. 1 and 2, before referred to. From the duty thus imposed, the owner of an engine such as that in question was exempted by the statute, but only on condition that he laid down the planks. If the object of laying the planks had not been stated, there would be no difficulty in construing the direction as plainly imperative, or, in other words, as creating a condition precedent. The language itself is imperative, "provided that before crossing . . . it shall be the duty," etc.—as imperative, indeed, as that contained in sec. 606 of the Municipal Act, on which the plaintiffs rely. And, after much consideration, my conclusion is, that, having regard to the course of legislation and to all the circumstances, this imperative language cannot on legal principles be properly construed as directory merely. Traffic by means of traction engines of every kind was plainly intended, it must now be assumed, to fall under the provisions contained in R.S.O. 1897, ch. 242, and its amendments, authorizing their use upon highways, and to be subject to the conditions thereby imposed. And, if these conditions are not observed, the traffic must be regarded as unauthorized.

It is not for the owner of the engine to say, "I will or I will not obey." He has no choice to obey or disobey. He cannot say, "I will not lay the planks; I prefer to pay for the injury I may do to the surface." He has no right at all on the bridge until he takes the means pointed out by the statute for protecting the surface. And if incidentally the laying of the planks for that purpose

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has the additional effect of strengthening the bridge, there is no good reason why such benefit should not enure to the advantage of the municipality.

In Maxwell on Statutes, 4th ed., p. 557, where the learned author is discussing the question of when statutory provisions should be considered as imperative and when merely directory, this is said: "When a statute confers a right, privilege, or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal." That seems to me to be a correct statement of the law, and to be applicable to this case, with the result that, in my opinion, the plaintiffs' case fails.

And a second or additional reason for such a conclusion is that the plaintiffs' cause of action is based upon negligence, for failure to obey a statutory duty is simply negligence, just as is the failure to perform any other legal duty; and to such an action contributory negligence is a good defence. Now, assuming that the defendants did fail in their statutory duty to maintain a sufficient bridge, I see no reason why they may not avail themselves of the finding of the learned trial Judge, that if the planks had been laid the accident would not have happened, and successfully contend that the plaintiffs' failure to do so was at least in the nature of contributory negligence, preventing a recovery. Mere collateral negligence would, of course, not have been sufficient. But this failure was not in respect of a collateral matter, but, on the findings of fact, of a matter directly causing or conducing to the result of which the plaintiffs complain: see *Welch v. Town of Geneva*, 110 Wis. 388. The statute there in question was of course different in terms from ours, but the case is nevertheless an interesting and useful exposition of a cognate subject. And the case of *Sutton v. Town of Wauwatosa* (1871), 29 Wis. 21, referred to in the *Welch* case, and which is also a bridge case, affords a well-defined instance of what would be collateral negligence in such circumstances.

The first ground, however, namely, that compliance with the conditions set forth in the proviso is in the nature of a condition precedent, is the one upon which I prefer to rest my judgment. And, holding that view, it follows from what I have said that, not only must the plaintiffs fail, but they are liable to the de-

fendants under the counterclaim for the damages done to the bridge, which damages were assessed by the learned Judge at \$77.80.

The appeal should be allowed and the action dismissed, both with costs; and the defendants should have judgment on their counterclaim, for \$77.80 and costs.

MACLAREN, J.A., concurred with GARROW, J.A.

MEREDITH, J.A.:—Whatever the Legislature really may have meant, that which they have said, in the sub-section in question, is, that before crossing a bridge, or culvert, such planks as may be necessary to fully protect the flooring or surface of the bridge or culvert shall be laid down by the person running the engine or machinery. It does not say the flooring of such bridge, or the surface of such culvert. The purpose expressed, whatever may have been meant, is to save the face of the flooring, the surface of the bridge or culvert. It does not require any laying down of planks except when necessary fully to protect such flooring or surface.

In this case it is not now said that any such protection was necessary, and, if not, the engine was rightly making use of the bridge, which the respondents had failed to keep in sufficient repair for the reasonable use of the traffic entitled to pass over it.

The judgment which this Court now pronounces wipes out of the enactment all of its words referring to the protection of the flooring, or surface, and liability for injury thereto, and adds to it words creating liability for all sorts of injury which the laying down of the planks would have prevented, notwithstanding that the primary cause of such injury may have been the grossest kind of neglect on the part of the municipality of the statute—imposed duly to keep the bridge in repair; and notwithstanding the liability plainly imposed upon it, by statute, for such an injury.

The imposition of a duty, by statute, for the benefit of individuals, gives to them a right of action for injury caused by breach of that duty; but only to the extent of the benefit intended: here the protection of the flooring or surface.

The judgment also seems to me to be in conflict with the

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principle which prevents those guilty of contributory negligence recovering.

I am, therefore, obliged to dissent.

Appeal allowed with costs; Moss, C.J.O., and MEREDITH, J.A., dissenting.

G. F. H.

[IN THE COURT OF APPEAL.]

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Costs—Set-off—R.S.O. 1897, ch. 324, sec. 7—Set-off Exceeding Plaintiff's Claim—Judgment for Defendant for Balance—Form of Judgment—Set-off Pleaded as Counterclaim—Appeal as to Costs—Discretion—Erroneous Principle.

Where the claims of the respective parties to the action consist of mutual debts, they are subject to the statutory provisions relating to set-off, now found in R.S.O. 1897, ch. 324, secs. 5, 6, 7. History of sec. 7, which provides that if upon a defence of set-off a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant shall be entitled to judgment for the balance.

Set-off and counterclaim, in our practice, remain in their nature different. The latter is in strictness a cross-action or claim for relief which cannot be obtained by the defendant in the action, and the costs of the action and counterclaim are usually dealt with as if the claims of the respective parties were the subjects of separate actions; while a set-off, when proved, is not only a statutory defence to the action, but where the defendant's claim over-tops that of the plaintiff he is also by sec. 7 entitled to judgment for the excess, the latter not being, as in England, necessarily or properly the subject of counterclaim, but rather an incident of the defence.

The proper judgment, therefore, when the defendant proves a set-off equalling the plaintiff's claim, is a dismissal of the action, and, if exceeding it, also a judgment for the excess.

Where the defendant, in asserting a set-off or other claim which is merely a matter of defence, pleads it as a counterclaim, the practice is to disregard the form of the pleading, and to dispose of the action and costs in accordance with the real character of the defence.

Review of the authorities.

Judgments of MEREDITH, C.J.C.P., and a Divisional Court, reversed, and judgment directed to be entered for the defendant dismissing the action and for the excess of the amount found due to him over that found due to the plaintiff, with costs.

Costs are by statute and Rule of Court in the discretion of the Court or Judge; but when such discretion has been exercised upon an erroneous principle or upon a misapprehension of the facts—in other words, where there has been no real exercise of judicial discretion—an appeal lies without leave.

By an order made by OSLER, J.A., on December 7th, 1908, 17 O.L.R. 493, the defendant was allowed to appeal to the Court of Appeal from an order of a Divisional Court consisting of FALCONBRIDGE, C.J.K.B., and BRITTON and RIDDELL, JJ., dated

October 9th, 1908, dismissing the defendant's appeal from an order of MEREDITH, C.J.C.P., upon motions made by both parties for judgment upon a report.

The facts are stated in the report in 17 O.L.R.

The original motions were heard by MEREDITH, C.J., in the Weekly Court on June 18, 1908.

L. V. McBrady, K.C., for the plaintiff.

C. A. Moss, for the defendant.

MEREDITH, C.J. (at the close of the argument):—I think the principle applicable to a case of this kind is well settled as stated by Osler, J.A., in *Ontario Forge and Bolt Co. v. Comet Cycle Co.* (1896), 17 P.R. 156, at p. 160. "The usual rule," he says, is "where the plaintiff succeeds on the claim and the defendant on the counterclaim, the former is to receive the costs of the action and the latter those of the counterclaim."

In this case the plaintiff is suing for board and lodging—at all events on an account for a considerable sum in excess of what the referee has found him entitled to.

The defendant denied his indebtedness on the account, and said that, instead of his being indebted to the plaintiff, the plaintiff was overpaid and there was a balance coming to him. Besides this, the defendant said that the plaintiff owed him \$700 for rent, and counterclaimed for that sum.

By the reply the plaintiff admitted the indebtedness for the rent, and there was really no dispute about it; in fact, before the litigation began the amount of rent had been put into the hands of a stakeholder to be handed over to the party who, as the result of this action, should be found entitled to it, the action being then simply to recover the amount which the plaintiff claimed to be due to him on the account. The defendant might have pleaded the \$700 as a set-off, and, if he had done so, different considerations would have been applicable to the question of costs. He has not chosen to do that, but has pleaded it as a counterclaim, and I think I must follow the ordinary practice as to costs in such cases.

In *Cutler v. Morse* (1888), 12 P.R. 594, the defence was that the work the price of which was sued for was unskilfully and negligently done, and that the plaintiff had failed to put in a hoist which he had contracted to put in, and that the defendant had had to put

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it in, and the defendant counterclaimed for the damages thus sustained. The action was referred to the local Master at Welland, who made his report finding that the plaintiff was entitled to what he claimed upon his contract, less the sum of \$177, which was to be deducted for unskilful and incomplete work; and he also found the defendant's damages upon his counterclaim to be the same sum, \$177. Armour, C.J., at p. 595, upon a motion for judgment, said: "According to the pleadings and the report of the Master, no question arose in this case which could not have been raised and determined herein had the action been brought before the Judicature Act. I do not think, therefore, that because this action was brought since the Judicature Act, and the defendant has chosen to call, in his statement of defence, that a counterclaim which is not properly a counterclaim, he is entitled on that account to have the costs dealt with as if it were properly a counterclaim. The plaintiff is entitled to judgment for the amount found due by the Master, with costs to be taxed upon the same principle as they would have been taxed in like case before the Judicature Act."

I do not think that case applicable here. There the learned Chief Justice would not permit the defendant, by improperly pleading as a counterclaim what was matter of set-off or matter of deduction from the plaintiff's claim, to get the benefit of the rule as to costs which I am applying; but it is an entirely different thing where the person who has pleaded matter as a counterclaim is seeking to get rid of the consequence of his having taken that course. As the defendant in this case has made his bed, so must he lie.

I therefore direct that judgment be entered for the plaintiff on his claim for \$288.33 with costs, and that judgment be entered for the defendant on his counterclaim for \$700 with costs, and that the defendant be entitled, in addition to his \$700, to whatever interest the money on deposit has earned in the bank, if it has earned any; and judgment will be entered in favour of whichever party is entitled, according as the result of the figures shew the balance for or against him. I suppose there will be a balance due the defendant, and, if there is, judgment will be finally entered for it. If it should be that the costs make the plaintiff's claim overtop the defendant's claim and costs, then there will be judgment in his favour for that balance.

What about the scale of costs? The \$288.33 is within the jurisdiction of the County Court, perhaps—how is that?

Moss. I suppose we can tax it and get our set-off.

McBrady. It was not a settled account.

MEREDITH, C.J.:—Then I suppose you are entitled to costs on the High Court scale. It was an unsettled account, and the county court, if I recollect right, has not a right to try cases where the balance of the unsettled account amounts to more than \$200.

Moss. Will your lordship give me leave to appeal, if so advised, on the question of costs?

MEREDITH, C.J.:—No, I think the new rule is that you must get leave from somebody else. I do not think I ought to lead you into thorny paths by giving you any leave.

The defendant appealed from the order of MEREDITH, C.J., and his appeal was dismissed by a Divisional Court on the 9th October 1908. The order dismissing the appeal contained a clause giving the defendant leave to appeal to the Court of Appeal, under sec. 72 of the Judicature Act, but providing that this leave was not to be deemed to be leave to appeal under sec. 76. Leave to appeal under sec. 76 was afterwards given by OSLER, J.A., as stated above.

This appeal was argued on February 3rd and 4th, 1909, before MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., and MAGEE, J.

C. A. Moss, for the appellant, contended that there was a right of appeal in this case, because it was not a mere discretion which had been exercised in the matter of costs, but there had been an error in principle, and the appellant was entitled to judgment for the balance found in his favour with costs. He referred to *In re Mills Estate* (1886), 34 Ch. D. 24; *In re Fisher*, [1894] 1 Ch. 450; *Young v. Thomas*, [1892] 2 Ch. 134, at p. 137; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756; *Bew v. Bew*, [1899] 2 Ch. 467; *King & Co. v. Gillard & Co.*, [1905] 2 Ch. 7.

W. E. Middleton, K.C., for the plaintiff, contended to the contrary, and that the judgment below had dealt with the question on the merits correctly; and that, the plaintiff having proved that \$288.33 was due to him, costs properly followed; that the

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defendant not having alleged a set-off as he might have done, but treated his matter as a cross-action, the disposition of the case was proper; and referred to *In re Schmarr*, [1902] 1 Ch. 326; *Mitchell v. Vandusen* (1887), 14 A.R. 517; *Fleming v. City of Toronto* (1892), 19 A.R. 318; *In re Miron v. McCabe* (1867), 4 P.R. 171; *Furnival v. Saunders* (1866), 26 U.C.R. 119; *Sherwood v. Cline* (1888), 17 O.R. 30; *Sanderson v. Ashfield* (1889), 13 P.R. 230; *Adlington v. Conyngham*, [1898] 2 Q.B. 492.

Moss, in reply.

June 8. The judgment of the Court was delivered by OSLER, J.A.:—Appeal by the defendant from the judgment of a Divisional Court affirming, without reasons reported, the judgment of Meredith, C.J.C.P.

The action was the ordinary action for work and labour and materials furnished by the plaintiff to the defendants, the items of claim as set forth in the statement amounting to \$1,166.12.

The defendant pleaded in his "statement of defence and counterclaim" (1) a denial of the plaintiff's claim; (2) payment; (3) overpayment and consequent indebtedness to the defendant; and (4) a claim for rent due to him by the plaintiff, \$700.

In his reply the plaintiff admitted liability for rent to the amount of \$700, but alleged that it had not been paid because of the defendant's own indebtedness to the plaintiff as sued for in this action; and further alleged that there was outstanding in the hands of one Armstrong a sum sufficient to satisfy the rent, which was held by him by mutual agreement pending the result of the action.

On the trial and by consent of counsel it was ordered that all matters in dispute in the action should be referred to J. A. McAndrew, official referee, pursuant to sec. 69 of the Arbitration Act. Further directions and costs were reserved. The referee reported that there was due by the plaintiff to the defendant, in respect of the matters set forth in the statement of claim, \$288.33; (2) that there was due to the defendant by the plaintiff in respect of the rent referred to in the counterclaim the sum of \$700; (3) that upon the reference "there was no dispute as to the defendant's claim for rent, the amount, \$700, being held by third parties pending the result of the action."

Both parties moved for judgment on further directions, and on

the plaintiff's motion an order was made: (1) that judgment be entered for the plaintiff against the defendant for \$288.33, with costs to be based on the High Court scale pursuant to the report of the referee; (2) that judgment be entered for the defendant against the plaintiff for the sum of \$700, with interest, if any, which has accrued upon the said \$700 in the bank where the \$700 is deposited, with costs to be based on the High Court scale pursuant to the report; (3) that one judgment be set off against the other judgment, and that judgment be entered in favour of the party "to whom the balance is ultimately found to be due."

The defendant contended that, though pleaded in form as a defence and counterclaim, yet that as his demand was strictly the subject of a defence of set-off, with the right to judgment for any balance remaining due to him over and above the amount due to the plaintiff, the judgment which ought to have been directed was a judgment dismissing the plaintiff's action with costs, and judgment for the defendant for the balance of his claim. The learned Chief Justice declined to accede to the contention, saying that the defendant "might have pleaded the \$700 as a set-off, and, if he had done so, different considerations would have been applicable to the question of costs. He has not chosen to do that, but has pleaded it as a counterclaim, and I think I must follow the ordinary practice as to costs in such cases. . . . As the defendant in this case has made his bed, so must he lie."

Judgment was accordingly directed as above, for the plaintiff in the action with costs, and for the defendant on the counterclaim with costs.

The defendant appealed from this order to a Divisional Court, asking for an order for the costs of the action and of the appeal, or such further or other order as might be proper, on the ground that he had succeeded in the action and should have been awarded his costs, and that the learned Chief Justice had applied the wrong principle in determining the disposition of costs, and had erred in considering himself bound to direct as he did. The Divisional Court dismissed the appeal, holding that under sec. 72 of the Ontario Judicature Act, no leave to appeal having been granted by the learned Chief Justice, no appeal lay from his decision as to costs, even where his discretion in dealing with them had been exercised on a wrong principle. The Court gave leave to appeal

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from their decision under sec. 72, a leave which was not to be deemed leave to appeal under sec. 76 of the Act. Leave to appeal under that section was afterwards given by a Judge of this Court.

One of the questions on the appeal is as to the proper form of the judgment on the motion for further directions; the other, whether, without leave, an appeal lies from the learned Chief Justice's order as to costs.

There can be no doubt that the claims of the respective parties to the action consisted of mutual debts, and were as such subject to the statutory provisions relating to set-off. These are now found in R.S.O., vol. 3 (2nd June, 1902), ch. 324, secs. 5-7, of which secs. 5 and 6 derive from the English statutes of set-off, 2 Geo II. ch. 22, sec. 13, and 8 Geo. II. ch. 24, sec. 5.

The history of sec. 7, which provides that if, "upon a defence of set-off," a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant shall be entitled to judgment for the balance remaining due to him, is worth noting. No similar provision is in the English statutes of set-off. Its origin with us is 11 Geo. IV. ch. 5 (1830), whence it passed into the Common Law Procedure Act, 1856, and thence, through the C.S.U.C. ch. 22, sec. 104, into the Revised Statutes of 1877, ch. 50, sec. 113. In the Revised Statutes of 1887 it is not found, having been repealed by 50 Vict. ch. 2, sec. 5: see R.S.O. 1887, schedule A., p. 2660; and it is noted in the Appendix A., p. 2693, as "superseded by the J. A. Rule 127 (a) (Con. Rule 373) *et seq.*," the former of which provided that a defendant in an action might set off, or set up by way of counterclaim, any right or claim whether it sounded in damages or not, and that such set-off or counterclaim should have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce judgment in the same action, both on the original and on the cross-claim. Consolidated Rule 373, above referred to, contained nothing about set-off, and the right to recover upon a cross-claim of whatever nature and whether arising before or after action, so far as it might exceed the amount of the plaintiff's claim, was thus left to be set up by way of counterclaim only, and so the law remained until the old provision was restored "as good as new" in June, 1902, in the 3rd volume of the R.S.O. above referred to.

Set-off and counterclaim, in our practice, remain in their nature different. The latter is in strictness a cross-action or claim for relief which cannot be obtained by the defendant in the action, and the costs of the action and counterclaim are usually dealt with (or may be so) as if the claims of the respective parties were the subjects of separate actions: *Baines v. Bromley* (1881), 6 Q.B.D. 691, 695; *Ontario Forge and Bolt Co. v. Comet Cycle Co.*, 17 P.R. 156; while a set-off, when proved, is not only a statutory defence to the action, but where the defendant's claim over-tops that of the plaintiff he is also by statute entitled to judgment for the excess, the latter not being with us, as it is in England, necessarily, or, it may even be said, properly, the subject of counterclaim, but rather an incident of the defence.

The proper judgment, therefore, when the defendant proves a set-off equalling the plaintiff's claim, is a dismissal of the action, since he succeeds in defeating the original claim: *Lowe v. Holme* (1883), 10 Q.B.D. 286; and, if exceeding it, also a judgment for the excess.

In pleading a set-off or other claim which is merely matter of defence, the defendant has sometimes pleaded it by way of counterclaim. When this occurs, the constant course of decision, when directing judgment and dealing with the costs, has been to disregard the form of the pleading, and to dispose of the action and costs in accordance with the real character of the defence.

Speaking of such a case, May, C.J., in *Ryan v. Fraser* (1884), 16 L.R. Ir. 253, at p. 261, said: "I do not think that the nomenclature of the defendant altered the substantial nature of the case, nor do I see why, in such a case, the Court should follow the example of *Baines v. Bromley*, 6 Q.B.D. 691, going out of its way to pronounce separate judgments in respect of claims quite of a cognate character. I should prefer the course taken in *Lowe v. Holme*, 10 Q.B.D. 287." The reference to *Baines v. Bromley* should have been to the first report of the case, at p. 197 of the volume. The question arose upon a motion to review the taxation where separate judgments had been directed on the claim and counterclaim, and on appeal (p. 691) the Court held that the taxation ought to have proceeded in accordance with the judgment, which had not been complained of, but gave a very clear indication of their opinion that it ought to have been entered treating the set-off as a defence to the action.

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In *Cutler v. Morse*, 12 P.R. 594, Armour, C.J., said: "I do not think that because . . . the defendant has chosen to call, in his statement of defence, that a counterclaim which is not properly a counterclaim, he is entitled on that account to have the costs dealt with as if it were properly a counterclaim."

Bennett v. White (1889), 13 P.R. 149, *per* Ferguson, J., is to the same effect.

So also *Sanderson v. Ashfield*, 13 P.R. 230. There the action was for the contract price for work done. The defendant counterclaimed for \$900, for the inferiority and incompleteness of the work. *Per* Boyd, C., at p. 231: "This line of defence is neither a set-off nor a counterclaim, but it is of avail to shew that the value of what was done amounts to less than claimed, or that so much be deducted from the contract price. . . . The plaintiff has substantially succeeded, and should get the general costs of the action and reference. From this the Master should deduct the costs incurred by the defendant in establishing the items of improper work on which he succeeded. *Cutler v. Morse*, 12 P.R. 594, is quite in point."

In *Girardot v. Welton* (1900), 19 P.R. 162, the question was again considered by Armour, C.J., who said, at p. 164: "It is not in a defendant's power to make that a counterclaim which is not really one, by merely calling it a counterclaim." The learned Chief Justice proceeded to point out the difference between the law of set-off in England and the law as he assumed it (though mistakenly) then to be in this Province: "Under the law relating to set-off in this Province, the defendant, if his set-off exceeded the plaintiff's claim, could recover the excess. In this Province, therefore, a set-off should not be treated as a counterclaim, or be pleadable as such." The defendant had counterclaimed for relief which she might have obtained in the action, and the claim and counterclaim were dismissed, and it was held that the plaintiff was not entitled against the defendant to costs as of a counterclaim or cross-action, but merely to such costs as were incidental to a claim which she had properly made in the action brought against her and which claim had been dismissed: *S.C.*, affirmed on appeal, 19 P.R. 201.

I cannot see why, in directing judgment in a case where the defendant succeeds by his set-off in defeating the action, it should

make any difference that he has erroneously shaped his defence as a counterclaim instead of as a set-off. All the cases I have referred to shew that it is the substance of the defence which is to be regarded, not its mere form. Why should a plaintiff who is shewn to have had no real demand against his opponent be in a better position because the latter, while stating the substance, has misdescribed the form of his defence—has used the wrong “nomenclature,” as May, C.J., *supra*, calls it? With all respect, I cannot agree that “it is an entirely different thing where the person who has pleaded matter as a counterclaim is seeking to get rid of the consequence of his having taken that course.” I deny that the judgment directed in the present case is or ought to be such a consequence.

The judgment, in my opinion, ought to have been a judgment dismissing the action and judgment for the defendant for the residue of his claim, and we direct the judgment below to be varied accordingly. On such a judgment the costs necessarily fall to be disposed of by this Court, and there is no reason why the action should not be dismissed and judgment for the excess directed with costs, leaving it to the taxing officer to tax them in the ordinary way. No doubt he will tax to the plaintiff anything to which he may, according to the practice, be entitled.

The same result, it appears to me, ought to follow even if we regard the appeal as an appeal as to costs, the point on which the argument before us chiefly proceeded, as it is plain that costs were given not in an exercise of the discretion of the learned Chief Justice, but as following the judgment which he thought was the proper judgment on the report, and treating the case as one of claim and counterclaim or action and cross-action, whereas it should have been regarded as one in which the defendant having been sued, rightly and according to law resisted the suit, and finally succeeded. In my opinion, no change has been made in the long and well settled practice as to when an appeal lies in respect of costs which are by law left to the discretion of the Court. The language of sec. 72 of the present Judicature Act is the same as that of the English Judicature Act, 1873, sec. 49, and of our Judicature Act of 1881 and our Rule 1030; and sec. 119 of our present Act, providing that “the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge,” corresponds with Rule 428 of the Act of 1881, and the English Rule R.S.C. Order LXV., Rule 1, part. I do not see that the words added to

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our present Act and Rule, corresponding with and apparently taken from the English Judicature Act of 1890, 53 & 54 Vict. ch. 44, sec. 5, "and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid," add any force to the language which declares that costs shall be in the discretion of the Judge, since it is to costs so given that the added words apply, and, in such case, no doubt, an appeal does not lie without the leave of the Judge making the order. But when such discretion has been exercised upon an erroneous principle or upon a misapprehension of the facts—in other words, where there has been no real exercise of judicial discretion—it has constantly been held in the English practice and our own that an appeal lies without leave: *Holmsted & Langton's Judicature Act*, pp. 122, 123, 1346; *Wansley v. Smallwood* (1885), 11 A.R. 439; *Mitchell v. Vandusen*, 14 A.R. 517; *Fleming v. City of Toronto*, 19 A.R. 318; *McCausland v. Quebec Fire Insurance Co.* (1894), 25 O.R. 330; *Young v. Thomas*, [1892] 2 Ch. 134; *Bew v. Bew*, [1899] 2 Ch. 467; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756, 765; *King & Co. v. Gillard & Co.*, [1905] 2 Ch. 7; *Rieken v. Yorke Peninsula Justices*, [1908] A.C. 454, 457; *Edmund v. Martell* (1907), 24 Times L.R. 25.

The plaintiff relied upon the case of *Adlington v. Conyngham*, [1898] 2 Q.B. 492, where the Judge of first instance had refused the costs of garnishee proceedings, apparently on the ground that such costs had in practice been regarded as a luxury which the plaintiff ought to bear. The Court of Appeal refused to entertain an appeal, no leave to appeal having been given by the Judge below, and Lindley, M.R., no doubt said, quoting sec. 49 of the Judicature Act of 1873: "No exception is made of cases involving a question of law or principle, nor is any reference made to the discretion of the Judge having been exercised." We were told that the Divisional Court had followed that decision in dismissing the appeal. I should myself have thought it a clear case in which no judicial discretion had been exercised, and I am unable to reconcile it with earlier or subsequent decisions of the same Court, above cited, which, to say nothing of our own practice, I think we ought to follow.

In the result, therefore, the appeal should be allowed, with costs here and below.

[DIVISIONAL COURT.]

SEMI-READY LIMITED v. TEW.

D. C.

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June 30.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Claim on Insolvent Estate for Rent and Taxes—R.S.O. 1897 ch. 170, sec. 34(1)—Provisions of Lease—Application to Agent of Lessee in Possession—Yearly or Monthly Subtenancy—Accelerated Rent—Preferred Claim—Extra-provincial Corporation—Status to Maintain Action—License.

The plaintiffs, for the purpose of carrying on a branch of their business, on the 1st March, 1907, became the lessees of a store at B., the lease being for five years, at an annual rental of \$800, payable monthly, and containing covenants by the plaintiffs to pay rent, taxes, etc., and not to assign, but they were permitted to sublet to an agent to carry on the business. The plaintiffs appointed H. their agent at B. for a term of five years, subject to determination, on notice. The plaintiffs alleged that H. also became sublessee for the term of the lease, and subject to all its liabilities; but, although a proper document had been prepared, no sublease was ever executed, it being conditional on H.'s furnishing security, which he failed to do. H. entered into possession, however, and carried on the business, paying the monthly instalments of rent up to September, 1907. On the 9th January, 1908, he made an assignment for the benefit of his creditors, to the defendant. H.'s appointment as agent had been cancelled on the 1st August, 1907, and in May, 1908, by an arrangement made with their landlord, the plaintiffs' lease was cancelled:—

Held, that H.'s holding was merely that of a monthly tenant, so that, as against him or his assignee, only the monthly rent due under such tenancy could be claimed, and not accelerated rent, made payable under the plaintiffs' lease in case of an assignment, etc.; nor could a claim for the taxes be maintained, the taxes, in the circumstances, being properly payable by the plaintiffs.

Section 34 of R.S.O. 1897 ch. 170, does not apply to a monthly tenancy, but only to a lease of at least a year's duration.

The plaintiffs' right to maintain the action was attacked, on the ground that, being an extra-provincial corporation, they had no license to do business in Ontario, as required by 63 Vict. ch. 24, secs. 6 and 14 (O.):—

Held, per RIDDELL, J., that such a license was necessary, but the difficulty was removed by the production of it after the argument of the appeal.

Bessemer Gas Engine Co. v. Mills (1904), 8 O.L.R. 647, followed.

Judgment of BOYD, C., at the trial, affirmed.

THIS was an action brought against Richard M. Tew, the assignee of the estate of one J. R. Hallman, to recover \$978.46, which the plaintiffs claimed to be due them for rent, insurance, cash advanced, and taxes, etc.

The plaintiffs were a Dominion corporation carrying on what was called a semi-ready clothing business, and having their head office in Montreal, with branches in Ontario.

On the 1st March, 1907, they leased a store in the city of Berlin, No. 36 King street west, from the owner, Karl Krantz. The lease was for five years, at an annual rental of \$800, payable monthly, the

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first month's rent being payable on the 1st April. The lease contained covenants by the plaintiffs to pay rent, taxes, etc., and also not to assign; but they might sublet to an agent appointed by them to carry on the business.

Arrangements were made with J. R. Hallman to act as the plaintiffs' exclusive local agent at Berlin, and carry on the business, negotiations being had with him at the same time as to his taking over the lease or a sublease thereof.

The whole question was whether what took place constituted Hallman a tenant either of Kranz or the plaintiffs on the same terms as those contained in the lease from Kranz, or whether Hallman was a yearly or monthly tenant to the plaintiffs, and the effect thereof with regard to the claim made by the plaintiffs against Hallman's assignee for rent, taxes, etc., Hallman having made an assignment for the benefit of creditors.

The evidence, so far as material, is set out in the judgments.

The trial took place before BORD, C., without a jury, at Toronto, on January 26th, 1909.

George Kerr, for the plaintiff.

G. M. Clark, for the defendant.

February 10. BORD, C.:—The turning point of this case appears to rest upon an ascertainment of the real status of the parties in respect to the store in question, which was leased by the owner, Kranz, for five years to the plaintiff company at a rent of \$800, payable monthly. The term began on the 1st March, 1907, and rent was to be paid first on the 1st April, and so on, not in advance. This company, through their agent and manager Beatty, at Berlin, made an arrangement with the insolvent Hallman by which he was to become the exclusive local agent of the plaintiffs for the sale and disposal of their garments for five years from the 2nd March, 1907; and it was understood between them that this line of business should be carried on in the store leased from Kranz. The letters which passed, so far as in evidence, throw the most satisfactory light on the arrangement, for the evidence by parol is conflicting.

Beatty writes to Hallman on the 11th March: "I am to-day in receipt of three copies of a lease drawn up by Millar & Sims between Mr. Kranz and our company. The directors have

accepted your contract and the line of credit agreed on, but would like you to take over the lease direct from us, and if this matter can be arranged that you give us some satisfactory guarantee and take over the lease it will be quite satisfactory. This is a matter that can be settled when you come to Montreal" (the headquarters of the company).

Hallman went to Montreal to select goods and discuss the lease. He swears there was no alteration of what had been arranged between him and Beatty, and that was, when he produced the security of his brother their lease was to be turned over to him. The officers of the company say that it was agreed at Montreal that Hallman was to take over the lease in its entirety, and to get his brother as security.

The next (material) letter is from the company at Montreal of the 26th March, 1907, addressed to Millar & Sims, in which it is said: "We are enclosing two copies of lease as entered into between Mr. Kranz (*sic*). This has been properly signed by the officers of our company. We would ask you to give one copy to Mr. Kranz and give the other copy to Mr. Hallman, but before giving Mr. Hallman his copy we would ask you to kindly prepare a document to be signed by him whereby he takes over this lease from us as per conditions of same. Also have his brother, Mr. A. H. Hallman, or some other party in Berlin of equal financial standing, to guarantee us against loss. In other words, Mr. Hallman will take over the lease and will be properly guaranteed against loss."

Beatty is not called, nor are the solicitors. Hallman says no writing as to the premises was given to him or signed by him. He could not get the security of his brother or its equivalent, and he apparently went into possession and began selling the goods, nothing more being said or done as to the nature of his holding.

The lease forbids the company assigning the term, but permits subletting "to any agent appointed by the company to carry on a branch of their business in the city of Berlin."

In the pleadings the plaintiffs allege that they entered into possession of the premises pursuant to the terms of the lease, and a short time afterwards sublet the premises to Hallman at the same rental and upon the same terms and conditions as were provided in the Kranz lease.

All that Hallman admits is that he read the Kranz lease and

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knew of its terms, and that he paid a monthly rental of \$66.66 to Kranz up to the 1st September, 1907. This knowledge of the terms of the head-lease carries the matter no further; for the law expects such an inspection from every under-tenant: *Clayton v. Leech* (1889), 41 Ch.D. 103.

The legal result appears to be this. There was a subsisting tenancy for five years between Kranz and the plaintiffs, which continued till some adjustment took place between them by which the term was ended in May, 1908. There was a sub-tenancy between the company and the insolvent, manifested by his taking possession and paying monthly rent.

Some other matters are now to be considered. By the terms of the written contract as to the agency he was to have the exclusive right to sell "semi-ready clothing in Berlin for five years from the 2nd March, 1907, subject to be terminated by either party giving three months' notice in writing." And also subject to its termination by the company, on ten days' notice in writing, on his making default in payment for goods or making an assignment for the benefit of creditors or attempting to sell contrary to the contract.

The company exercised this right of putting an end to the agency for cause on the 1st August, 1907, when, as the vice-president, Mr. Woods, puts it, "we cancelled the contract" as to the exclusive sale. Hallman paid the monthly rent to Kranz on the 1st September, but thereafter made default, and, getting into difficulties generally, he assigned for the benefit of creditors to the defendant on the 9th January, 1908.

In view of these circumstances, what was the nature of Hallman's subtenancy? At the most I do not think it could be carried further than a yearly tenancy, but, considering the precarious nature of his agency contract and its termination in August, and the monthly payments made by him, ceasing in September, the law would not impute a larger interest in him than that of a monthly tenant. In the absence of other controlling circumstances implying a different intention, the payment of monthly rent is deemed to indicate a monthly tenancy: *Bell on Landlord & Tenant*, p. 32.

The rent in arrear from the 1st October, 1907, and the taxes for 1907 and 1908, have been paid, the one to the landlord Kranz and the other to the city, by the tenants, the plaintiffs.

A double set of preferential claims for these taxes and three

months' accelerated rent has been made by the landlord Kranz and the tenants, the plaintiffs; but they have been merged by assignment to the plaintiffs. The claim is rested on the statute and on the terms of the lease, which (*inter alia*) provides that "if the lessees, their agent or agents, shall make any assignment for the benefit of creditors . . . then the current three months' rent next accruing and the taxes and frontage and local improvement rates for the then current year shall immediately become due and payable . . . the taxes to be recoverable in the same manner as the rent hereby reserved."

The statute is R.S.O. 1897, ch. 170, sec. 34 (1): "The preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased."

The assignee had disposed of all the goods by the 26th February, and relinquished possession then. The evidence fails to establish that this lease was taken over by the assignor Hallman with all its liabilities. This was intended by the plaintiffs, and they had directed a proper document to be prepared for that purpose, but, as Hallman failed in providing security, this intention was not carried out, and nothing appears to implicate Hallman except the mere fact that he went into or was let into possession of the store early in March, 1907. If this entry and the payment of rent monthly would amount to a yearly tenancy, that year would expire at the end of February, 1908 (the lease being dated the 1st March, 1907). If it was less than this and amounted only to a monthly tenancy, his tenancy ended with the assignment in the month of January, 1908. He was not assignee of the lease, but at most a subtenant not in privity with the landlord and not liable on the covenants in the lease to pay taxes, etc. So far as Kranz was concerned, he had the right to collect and distrain for the rent due to him by his tenants, the plaintiffs, up to the time of the assignment and for a month thereafter, out of the goods of Hallman then on the place. That amount of arrears, \$322.30, the assignee is willing to allow as a first charge on the assets—a preferential lien. The statute does not aid Kranz any further, for his tenants have not become insolvent or made an assignment, and

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he can claim rent from them as it falls due subsequent to February, when the goods were sold and the assignee went out of possession. Nor does the lease aid Kranz as against Hallman, for Hallman was not personally bound by its provisions, though he may have occupied subject to them, as between the plaintiffs and their landlord.

So far as the plaintiffs are concerned, they have proved no agreement touching this property and rent which binds Hallman in contract.

I may just note, on the words of the lease itself, that there has been no breach of the proviso, even if it is applicable to this sub-tenant; what is covered is the case of an assignment by the agent of the company, but the agency of this insolvent ceased when the contract was duly cancelled in August, 1907.

The plaintiffs must rest on the statute, so far as it applies, and that does not carry the matter further than as to the rent up to the end of February. The statute does not apply to the case of a monthly tenancy, *i.e.*, from month to month, but to a case where there is a term existing of at least yearly duration. But the year in this case, assuming a yearly term, would end on the last of February, and rent up to that date is agreed on as a preferential claim. After that date, the assignee being out of possession, there can be no arrears of rent to which the restriction of the statute can apply: see *Langley v. Meir* (1898), 25 A.R. 372.

As to the taxes for 1907, Hallman says he did not agree to pay taxes, and that no tax bills were served upon him or demanded from him. The expenses of advertising the business were paid by the plaintiffs, and it is not unreasonable that they should also pay the taxes, if no provision was made to relieve them from the covenant so to do. As a matter of fact, when the claim was made for the taxes as a preference before the assignee, these taxes had not been paid and the goods had been sold and realized upon. The plaintiffs paid the taxes for which they were legally liable, after action, on the 17th June, 1908, and the claim was contested on the 6th May, 1908, and the writ was issued on the 2nd June, 1908. Under the contract the business conducted at Berlin by the insolvent was practically the business of the "Semi-Ready" concern, and primarily the plaintiffs should meet the taxes, if there was no other agreement with their agent Hallman: *Dove v. Dove* (1868), 18 C.P. 424; and Assessment Act, 4 Edw. VII. ch. 23, sec. 92. No

one is called to prove anything about the taxes, when or how imposed, when demanded, or to whom charged. I find no ground on which the taxes of either 1907 or 1908 should be ranked as preferences in favour of the plaintiffs.

This conclusion renders it unnecessary to deal with the *locus standi* of the plaintiffs to maintain an action because of the inhibition laid upon extra-provincial corporations by the Ontario statute 63 Vict. ch. 24, secs. 6 and 14. It is for the interest of the creditors of the estate to have a determination as to the right to rank preferentially, rather than to have it determined that the plaintiffs are unable to raise the question in the Courts.

As it is, I find that the claim of the plaintiffs fails and should be dismissed with costs, on the undertaking of the defendant to allow ranking preferentially to the extent mentioned of \$322.30.

From this judgment the plaintiffs appealed to a Divisional Court.

On April 20, 1909, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

George Kerr, for the appellants.

G. M. Clark, for the respondent.

June 30. BRITTON, J.:—This I regard as a hard case upon the plaintiffs, but it seems to be altogether owing to the fact that they did not protect themselves, as they fully intended to do, by some agreement with Hallman, which would place Hallman in the relation of tenant either to Kranz or to the plaintiffs on the same terms as contained in the lease from Kranz to the plaintiffs.

The plaintiffs desired to assign their lease to Hallman. This they could not do, as it was prohibited by the lease. And, even if they could, Hallman did not accept an assignment. Possibly the plaintiffs could have overcome that difficulty by getting Kranz's consent or by a surrender of the old lease, and having a new one to Hallman, had they pressed for this, but they did not.

The plaintiffs could have sublet to Hallman, as he was an agent of the plaintiffs' company, but they did not sublet by any such lease or upon any such terms as were contained in the Kranz lease.

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The learned Chancellor has found that Hallman was only a monthly tenant to the plaintiffs. That finding is in accordance with the evidence; and if that finding stands—as, in my opinion, it must—the defendant's liability is so limited that the plaintiffs are not entitled to succeed in this action. As to the insolvent tenant, Hallman, and as against his assignee, the plaintiffs are entitled to only such rights as exist in favour of a landlord against a monthly tenant, so sec. 34 of R.S.O. 1907, ch. 170, has no application. There were no special rights given to the plaintiffs, such as in the ordinary form of lease for a term of years, so nothing to restrict, nothing for sec. 34 to affect. Upon the one finding of fact—viz., the monthly tenancy of Hallman under the plaintiffs as his landlords—this motion must be dismissed with costs.

RIDDELL, J.:—Carl Kranz leased to the plaintiffs for five years from the 1st March, 1907, a certain store in Berlin at a rental of \$800 per annum, payable monthly, beginning on the 1st April—taxes, etc., to be paid by the lessees. The lessees covenanted not to assign, but they were given the power to sublet to an agent appointed by them to carry on a branch of their business in Berlin, they being a Dominion corporation.

The plaintiffs, through their agent, Beatty, made an arrangement with one Hallman to act as their agent in Berlin, and it was understood that the business was to be carried on in the store leased to them by Kranz. It was also understood that Hallman would take over the lease, assuming all obligations under it. No formal assignment was, in fact, made, but Hallman went into possession and paid the rent as it came due until September, 1907. Some little time thereafter he failed in business, and made an assignment (on the 9th January, 1908) to the defendant.

The plaintiffs paid the rental to Kranz from the 1st September, 1907, to the 1st June, 1908, with taxes, etc. (\$822.71), and on the 20th May made an arrangement with Kranz for surrender on a subsequent day.

Tew went into possession at and after the assignment, sold out, and turned over the stock and premises about the 26th February, handed the purchaser the key, the purchaser having agreed to arrange with the landlord. Tew had nothing more to do with the premises after the 26th February, 1908.

The plaintiffs filed a claim against the estate of Hallman as follows:—

Five months' rent from 1st September, 1907, to 1st February, 1908, at \$66.66.....	\$333.30
Interest	3.80
	<hr/>
	\$337.10
By cash.....	20.00
	<hr/>
	\$317.10
Plate glass insurance.....	5.00
	<hr/>
	\$322.10
Three months' accelerated rent under terms of lease and sec. 34 of R.S.O. 1897 ch. 170	\$200.00
Taxes, 1907.....	212.36
Business assessment	21.39
Taxes, 1908, including business assessment.....	222.61
	<hr/>
	\$978.46

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The rent claimed as from the 1st September, 1907, to the 1st February, 1908, is in reality for the months September, 1907, to February, 1908, inclusive.

The claim was contested at the instance of the inspectors, and this action was then brought for the amount, the plaintiffs claiming the amount as a preference. The defendant says that Kranz filed a claim for the sum of \$322.30 for arrears of rent, interest, and insurance as a preferential claim, and that this claim was allowed; he pleads that the plaintiffs, a Dominion corporation, have no provincial license, and asks for a dismissal of the action. At the trial before the Chancellor, in January, 1909, at Toronto, the action of the plaintiffs was dismissed with costs, on the undertaking of the defendant to allow ranking preferentially to the amount of \$322.30.

The plaintiffs now appeal.

All difficulty as to the want of provincial license is removed by the production of such license, obtained since the argument of the appeal. See *per* Street, J., in *Bessemer Gas Engine Co. v. Mills* (1904), 8 O.L.R. 647, at p. 649 *ad fin.*; *per* Britton, J., at p. 650 *ad fin.* The action may now be "maintained." Such a license was, in my opinion, necessary: *S.C.*

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The plaintiffs contend that Hallman had made an enforceable agreement to take over the lease, and that their rights, as against him and his estate, must be the same as though he had actually executed the proper documents. No doubt, if it were proved that he had agreed to become their tenant by an enforceable agreement, there would be no necessity of a formal lease: *Walsh v. Lonsdale* (1882), 21 Ch.D. 9; *Foa on Landlord and Tenant*, p. 12 *et seq.* The taking of possession would be a sufficient act of part performance if the oral contract were well proved: *Fry on Specific Performance*, 4th ed., secs. 602, 603, and especially 604.

The difficulty in the way of the plaintiffs is the necessity for fairly conclusive evidence of the contract itself. It is to be noticed that they have not the power to assign the term; all they can do is to sublet to an agent appointed by them to carry on a branch of their business in Berlin.

Wood, the vice-president of the plaintiffs, says Hallman "was to take over the lease just as we had it—the lease which had been made while he was negotiating for the purchase of the business; the lease which our Mr. Beatty . . . said he wished to have." "Q. He was to take over the lease and pay the rent and taxes? A. Assume all the obligations." Counsel for the plaintiffs explains this thus: "Assume all the obligations that you were under in the lease." Beatty writes Hallman, on the 11th March: "The directors . . . would like you to take over this lease direct from us. . . . This is a matter that can be settled when you come to Montreal." Wood says: "Hallman admitted . . . that he was willing to take over the lease as it stood." "He specifically agreed . . . to take over the lease."

Nelson: "The lease came up, which he (Hallman) agreed to accept." "The question of the lease was discussed. Mr. Hallman agreed to accept the lease as he read it." Hallman cannot remember that he agreed to take over the lease as it stood. He "was to pay the rent," but cannot recollect that he was to pay taxes. "He (Beatty) asked me whether I had anybody to go security for me; any responsible party." "Q. And when you produced security, what would happen? A. He would turn the lease over to me. Q. And if you did not produce security, what would happen? A. Nothing said."

He understood that he was "getting the same privileges that the Semi-Ready had under that lease." No security was forthcoming.

It is obvious that all this is far from proving that there was a contract by Hallman to become a subtenant of the plaintiffs under a lease containing the same terms as their lease from Kranz. Such bargaining as did take place seems to have been directed to an assignment of the lease to Hallman—which assignment the plaintiffs had no power to make. It is not without significance that the plaintiffs, on the 1st November, refuse a draft for two months' rent made by Kranz, saying: "All these payments should be made by Mr. Hallman."

The Chancellor was, in my opinion, going the full length when he held that Hallman was a monthly tenant of the plaintiffs. He (H.) must be held liable to pay all rent unpaid, of course, but not taxes, etc.

By the judgment appealed from, the plaintiffs are allowed to receive as a preferential claim out of the estate of Hallman the sum of \$322.30—*i.e.*, the rent from September, 1907, to February, 1908, inclusive, interest and plate glass insurance. That, I think, is all they are entitled to.

As to costs, the action might well have been dismissed with costs because of the want of provincial license, and I do not think that the plaintiffs can complain that the action was dismissed with costs upon other grounds—the judgment is to be looked at; not the reasons. Had the license been forthcoming at the trial, the proper judgment, in my view, would have been to give the plaintiffs \$322.30, and as more was sued for, without costs; but the license was not forthcoming.

When the appeal was argued, the license was still not forthcoming, and we might well have dismissed the appeal with costs on that ground. The production of the certificate now should not affect the question of costs—and it would be useless to modify the judgment at the trial, as the plaintiffs are getting by the undertaking of the defendant all they are entitled to.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree that the appeal must be dismissed with costs.

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[IN CHAMBERS.]

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Criminal Law—Selling Obscene Books and Pictures—Place of Offence—Evidence—Confession—Summary Trial—Police Magistrate—Reducing Charge to Writing—Prejudice—Examination of Documents before Trial—Conviction—Habeas Corpus—Certiorari in Aid—Amended Conviction—Scienter—Defective Warrant of Commitment—Direction to Amend—Detention of Prisoner—Substitution of Valid Warrant—Criminal Code, secs. 207 (a), 778 (3), 1120, 1124.

The defendant was summarily tried and convicted by one of the police magistrates for the city of Toronto upon a charge laid under sec. 207 (a) of the Criminal Code. The information was that he "at the city of Toronto . . . did sell a quantity of obscene books, printed matter, pictures and photographs tending to corrupt morals." Being in prison pursuant to the conviction, an application was made for his discharge on the return of writs of *habeas corpus* and *certiorari* in aid.

The evidence before the magistrate was given by police detectives, who said that they found the articles produced upon the person of the defendant and in a valise in his room, that the defendant admitted that the valise was his, and said he had sold all these things for \$200—"he did not say he had sold them here," i.e., in the city of Toronto, "but said he was here and expected to get the money here." No evidence was offered for the defence:—

Held, that there was evidence that the sale took place in Canada.

2. It was urged that before evidence of a confession can be admitted, the prosecution must prove affirmatively that the confession was free and voluntary:—

Held, assuming the rule to be as stated and to be applicable upon such a motion, that there was nothing to shew that all the facts necessary to make the evidence admissible were not properly proved; the written record need not contain the allegations of a witness which will render his evidence admissible.

3. A confession alone is sufficient to justify a conviction.

4. Upon the evidence, sec. 778 (3) of the Criminal Code, requiring the charge to be reduced to writing and read over to the accused, after his consent to be summarily tried, was complied with; there is no reason why the charge should not be prepared in advance in anticipation of the accused's election; and the fact that the charge is in the form of an information is immaterial.

5. It was objected that, before the actual trial of the case, the magistrate had looked at the books and pictures found in the defendant's possession, and had thereby necessarily become prejudiced against the defendant:—

Held, that, as the magistrate was at liberty to look at the productions before issuing a summons or warrant, in order to form his opinion as to whether or not a case was made out, he was entitled to do so after the defendant was in custody, or at any time.

6. The information under which the defendant was convicted omitted to state that he "knowingly" did the act charged, which under the statute is a material element in the offence, and the same omission was made in the conviction and in the warrant of commitment:—

Held, that, though the magistrate had amended the conviction, before return to the *certiorari*, by inserting the word "knowingly," and though the defect in the information was immaterial, the omission of the word "knowingly" in the warrant was a fatal objection to its validity, which was not cured as being an "irregularity, informality, or insufficiency," within the meaning of sec. 1124 of the Code.

7. Although, however, the original warrant was clearly bad, the Court or Judge had power under sec. 1120 of the Code to "make an order for the further detention of the person accused," and to direct the issue of a new warrant in accordance with the conviction as amended by the magistrate.

Rex v. Morgan (1901), 5 Can. Crim. Cas. 63, 272, 2 O.L.R. 413, 3 O.L.R. 356, followed.

8. A conviction made by a magistrate, though under the summary trial provisions of the Criminal Code, is not in the same position as a conviction made by the Sessions, and may be amended by the magistrate before return to a *certiorari*.

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APPLICATION by the defendant, upon the return of a *habeas corpus* and *certiorari* in aid, for his discharge from custody under a commitment issued pursuant to a conviction made by one of the police magistrates for the city of Toronto, for selling obscene books and pictures, etc.

The motion was heard by RIDDELL, J., in Chambers, on the 13th April, 1909.

Eric N. Armour, for the defendant.

J. R. Cartwright, K.C., for the Crown.

April 19. RIDDELL, J.:—Martin T. Graf, alias M. Munroe, who describes himself as of Buffalo, New York, is in the Central Prison under sentence for selling books, pictures, and photographs which his counsel states are of so obscene, filthy, and disgusting a nature that for a magistrate to look at them would necessarily prejudice him against the prisoner. I accept counsel's statement as to the character of his client's literature, etc., without comment.

Graf applies to be released from custody upon many grounds; and, of course, blackguard as he is, he is entitled to every advantage the law may give him. Men, under our system, are not to be punished for sin, nor are they to be punished even for committing a crime unless they have been proved guilty of crime in the proper way. Our Code, by sec. 1027, provides specifically for this.

The case was argued very fully and ably by Mr. Armour. I now proceed to dispose provisionally of the points raised, in their order—premising that this is an application for discharge from prison upon the return of a writ of *habeas corpus* with a *certiorari* in aid.

1. It is urged that there is no evidence that the sale complained of took place in Canada.

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The information is that the "said Martin T. Graf, alias M. Munroe, in the month of March, 1909, at the city of Toronto, in the county of York, did sell a quantity of obscene books, printed matter, pictures, and photographs, tending to corrupt morals."

The charge is laid under the provisions of the Criminal Code, R.S.C. 1906, ch. 146, sec. 207 (a). The evidence is given by persons who are said by counsel for the prisoner to be police detectives. They say that they found the articles produced, part of them upon the person of the prisoner, and the rest in a satchel and valise in his room—that the prisoner at first denied, but afterwards admitted, that the valise was his, and said he had sold all these things for \$200. "He did not say he had sold them here, so far as I remember, but he said he was here and expected to get the money here that day; we were at the — House in this city at the time of the conversation."

No evidence was offered for the defence.

This is not wholly unlike the cases of *Rex v. Highmore* (1705), 2 Ld. Raym. 1220, and *Rex v. Jeffries* (1786), 1 T.R. 241, in which the jurisdiction of the magistrate depended upon the *locus* of the offence. It was held that it must affirmatively appear from the evidence that the offence was committed within the prescribed place.

In an application for discharge under a writ of *habeas corpus*, in the case of a conviction under the Liquor License Act, it is said: "The Court will examine the depositions and proceedings before the magistrate to ascertain if a conviction was justified, although the formal conviction returned appears regular on its face:" *Rex v. Simmons* (1908), 14 Can. Crim. Cas. 5, 17 O.L.R. 239, *per* Anglin, J. Assuming the accuracy of this, in cases of this kind, the case is not advanced; for the Court will not, if there be any evidence at all upon which a jury or a Judge might so find, interfere with a finding as against evidence or the weight of evidence: *Rex v. McArthur* (1906), 8 O.W.R. 694. I think, had it been a civil proceeding in which it rested upon the plaintiff to prove that the defendant had made a sale in Toronto, that any jury or Judge would be well justified in finding such sale proved upon the admissions made, at least coupled with the fact that no evidence was offered by the defendant to the contrary. I can-

not now look at his affidavit as to the place of sale; the proper place to have the evidence adduced was before the police magistrate.

2. Then it is urged that the evidence of the confession was not rightly admitted. It is said that before evidence of a confession can be admitted, the prosecution must prove affirmatively that the confession was free and voluntary; and such cases as *Regina v. Thompson* (1893), 17 Cox C.C. 641, are cited. I do not think it necessary to go through the cases or to inquire what is the rule in its exactness. Much might be said in favour of the opinion of Erle, J., in *Regina v. Baldry* (1852), 2 Den. C.C. 430, at p. 446: "Unless it be clear that there was either a threat, or a promise to induce it, it ought not to be excluded." Granting the rule as claimed by the prisoner, and granting also that such an objection can be taken upon an application of this kind—it has been laid down that "a Court acting within the sphere of its jurisdiction is conclusively presumed, so far as all collateral inquiries are concerned, to have performed its duty, and the question whether other than legal evidence was admitted in its proceedings will not be considered by a higher Court:" Church on Habeas Corpus, 2nd ed., sec. 196, p. 281—there is nothing to shew that all the facts necessary to be established in order to make such evidence admissible were not proved to the satisfaction of the police magistrate, in a manner which should have been satisfactory to him. Only the evidence which bears upon the questions to be tried need be taken down, as I read the law. There is no more necessity for the written record to contain the allegations of a witness which will render his evidence admissible than the examination upon *voir dire* of a child, or that of some person who, it is contended, should not be allowed to be sworn on account of his infidel opinions. And the prisoner himself, in the affidavit he makes, does not assert that it was not proved, before the evidence was admitted, that the confessions were not brought about by threats or promises, etc.—nor does his solicitor.

If we cannot go outside of the written evidence in the police court, moreover, it nowhere appears that the witnesses were policemen or persons in authority such that, within the rule, their threats or persuasion would prevent the confessions being given in evidence: Roscoe's Crim. Ev., 11th ed., pp. 43, 44.

It is not without significance that all the evidence was given,

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without objection, in the presence of the prisoner and his counsel, as, had there been any objection to the admissibility of the evidence, no doubt objection would have been taken.

3. That a confession alone is sufficient to justify a conviction has been law since 1789: *Wheeling's Case*, 1 Leach 311*n*. Before that time, and indeed since, there has been considerable discussion whether or not an extra-judicial confession, uncorroborated in any way whatever, is sufficient to found a conviction: Taylor on Evidence, 10th ed., sec. 868; but the doubt has not received any judicial sanction for many years.

4. The charge should have been reduced to writing.

The trial was under sec. 777 of the Code, in Part XVI., respecting summary trial of indictable offences, the prisoner having consented to be tried by the police magistrate. Section 778 (3) provides that "if the person charged consents to the charge being summarily tried . . . the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge."

What appears upon the papers is as follows. On the 16th March, 1909, an information was sworn to before the police magistrate; upon the same day, whether at the same time as or before or after the laying of the information, the prisoner elected to be tried summarily, and pleaded "not guilty," and was remanded to the 23rd. It nowhere appears how the prisoner was brought before the police magistrate—I should think that he appeared before the police magistrate charged with the crime before the information was drawn up. It is the duty of the magistrate, after ascertaining the nature and extent of the charge, to state to the prisoner the substance of the charge against him. There is no reason to doubt that this was properly done. Then the magistrate asks him whether he consents to be tried before him (the magistrate). No doubt this was done. Then, and not till then, according to the Act, comes the duty to reduce the charge to writing. (I mean in logical sequence, not necessarily in point of time, because I see no reason why the magistrate may not have the charge prepared in advance in anticipation of the prisoner's expected or possible choice.) The information seems then to have been prepared, as, instead of the complainant praying for the issue of a warrant or summons, the sentence reads, "Complainant prays that justice

be done in the premises." After the charge has been reduced to writing, the magistrate is to "read the same to such person, and shall then ask him whether he is guilty or not of such charge." There is nothing to shew that this was not done—if so, the proceedings were wholly regular. I think the fact that the charge is contained in a document in the form of an information is wholly immaterial: *Rex v. Shepherd* (1902), 6 Can. Crim. Cas. 463.

5. It is contended that the police magistrate must be considered as having prejudged the case. No imputation of wilful misfeasance is made against the police magistrate, but it is said that his simply looking at these utterly vile and disgusting pictures, etc., must of necessity prejudice him against the defendant. (All allegations in the affidavit of the prisoner are withdrawn in this connection; and the only fact now alleged is that, before the actual trial, the magistrate looked at the productions.) If the prisoner was brought before the police magistrate upon summons or warrant issued by him, as to which we are left in the dark, it was the duty of the police magistrate, before issuing summons or warrant (sec. 655), "to hear and consider the allegations of the complainant," and, "if of the opinion that a case for so doing" was "made out," to "issue a summons or warrant." The magistrate must satisfy himself that a case has been made out before issuing a summons or warrant; to do that he may need to look at the pictures, etc., which it is alleged are obscene. It is perfectly notorious that many of the best people in the world look upon that as obscene which others, equally good but of different training or temperament, consider not only harmless, but even a thing of beauty: see *Commonwealth v. Buckley* (1909), 86 N.E. Repr. 910, for an instance. It is not safe for any magistrate to take the opinion of some persons—even some policemen—as to what is and what is not obscene. And what will "tend to corrupt morals" is very much a matter of individual opinion and judgment. Thousands of the best people would suffer persecution rather than look at a theatrical performance or a horse-race, while both are held harmless by many—some of whom assert that the former at least may be and often is edifying and of great moral value. The police magistrate might well, then, look at these productions—and if he could do so before, he might after the prisoner was in custody, or at any time.

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There is nothing in what I have said at all opposed to *Regina v. Petrie* (1890), 20 O.R. 317, or *Rex v. Walsh* (1904), 8 Can. Crim. Cas. 101—this case may be looked at in respect to reading to the accused, as the charge reduced to writing, an information previously prepared—or *Rex v. Legros* (1908), 17 O.L.R. 425. The British Columbia cases cited have no application: *Rex v. McGregor* (1905), 11 B.C.R. 350; *Rex v. Williams* (1905), *ib.* 351.

6. The information is that the prisoner did, “contrary to law, sell a quantity of obscene books . . .” The statutory offence is “knowingly, without lawful justification or excuse . . . sell . . . obscene book . . .” The gist of the offence consists in the *scienter*, and such *scienter* is not alleged. The charge as read to the prisoner contained no offence against the law.

Rex v. Hayes (1903), 5 O.L.R. 198, is a case in which the defendant was convicted under 60 & 61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13 (D.), for unlawfully causing the importation of an alien from the United States into Canada under contract to perform labour in Canada. The statute contained the word “knowingly;” and the Court (Street and Britton, JJ.), held that the conviction was on its face bad, citing *Carpenter v. Mason* (1840), 12 A. & E. 629; *Regina v. Justices of Radnorshire* (1840), 9 Dowl. P.C. 90. So also in *Rex v. Beaver* (1905), 9 O.L.R. 418, the word “knowingly” was held by the Court of Appeal to be of cardinal importance. *Rex v. Tupper* (1906), 11 Can. Crim. Cas. 199, and *Ex p. O’Shaughnessy* (1904), 8 Can. Crim. Cas. 136, may also be looked at.

The conviction followed the information, as did the warrant of commitment. Unless the conviction can be amended, the motion must succeed.

The conviction, before return to the *certiorari*, was amended by inserting the word “knowingly;” but the information and the warrant returned do not contain this word. It is quite clear that the police magistrate might amend the conviction at any time before the return: *Regina v. McCarthy* (1886), 11 O.R. 657. And it is equally clear that the fact that the information is defective is immaterial: *S.C.*, at p. 658; *Regina v. Emily Munro* (1864), 24 U.C.R. 44.

7. But the warrant which has been returned by the gaoler has not been amended, nor has a new warrant been substituted

therefor. Even if the case came within R.S.C. 1906, ch. 146, sec. 1124, the omission of the word "knowingly" is not an "irregularity, informality, or insufficiency," within the meaning of that section: *Rex v. Hayes*, 5 O.L.R. 198, especially at p. 201.

The warrant is clearly bad: *Rex v. Nelson* (1908), 18 O.L.R. 484, and cases cited at p. 486.

In a case of this kind my brother MacMahon held that the proper course is to enlarge the motion so as to enable the magistrate to file a fresh warrant of commitment in conformity with the conviction returned: *Regina v. Lavin* (1888), 12 P.R. 642. There may be some doubt as to the power to act thus independently of the authority given by the statute. I think, however, sec. 1120 is broad enough to cover this case. It is argued that this section applies to cases before conviction only; but my brother Latchford recently acted upon it in the case of two persons under sentence; and Mr. Justice Ferguson did not seem to doubt that the power exists, though he declined to exercise it in *Regina v. Randolph* (1900), 32 O.R. 212: see p. 215.

Without making any final determination, I direct the further detention of the prisoner Graf, alias Munroe, and direct the police magistrate to lodge with the warden of the Central Prison of the Province of Ontario a warrant in accordance with the conviction.

The case will be adjourned for further hearing until Friday the 23rd April, at 10 a.m., at which time the delivery of the amended warrant is to be proved by affidavit; and I then shall finally dispose of the matter.

After the delivery of the above judgment, a proper warrant was lodged with the warden of the Central Prison, and further argument of the motion for the discharge of the prisoner was heard by the learned Judge on the 30th April.

Eric N. Armour, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

May 3. RIDDELL, J.:—Mr. Armour argues that no power exists in the police magistrate to amend a conviction, reasoning from the analogy of convictions made by the Sessions. He points to the various provisions of Part XVI. of the Criminal Code as shewing the analogy. No doubt such analogy does exist to a certain extent, and there is a clear line of demarcation, historically

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and otherwise, between summary convictions under Part XV. and convictions after summary trial under Part XVI. But, though there is an analogy between convictions of this kind and those before the Sessions, the analogy is not perfect—otherwise a writ of *habeas corpus* would not issue. The statute 29 & 30 Vict. ch. 45, sec. 1 (C.), expressly excludes the case of a prisoner imprisoned under conviction of the Court of General Quarter Sessions.

If, then, this conviction is on all fours with that of the Sessions, the writ of *habeas corpus* was improvidently and improperly issued, it must be quashed, and so the present application must fail. I think it is not: *Rex v. Morgan* (1901), 5 Can. Crim. Cas. 63, 272, 2 O.L.R. 413, 3 O.L.R. 356.

In respect of the original warrant, I hold that it is bad: *ante* at p. 245. Had the writ of *certiorari* in aid not issued or been asked for, I should on the previous occasion have discharged the prisoner: *Re Timson* (1870), L.R. 5 Ex. 257; *Regina v. Chaney* (1838), 6 Dowl. 281—see also *Re Nelson ut supra*. But a *certiorari* has issued, and under that I find returned a conviction which is perfectly good upon its face and wholly supported by the evidence. The argument that there was an original conviction, and this an amended conviction, and that, being a conviction under Part XVI., it could not legally be amended, has, in my opinion, nothing to support it. It is a conviction not by the Sessions but by a magistrate; and I can find no authority for the proposition that the general rule as to amending before return to a *certiorari* is not applicable to a case of this kind.

As to the power to permit an amendment of the warrant after the return to the writ of *habeas corpus* has been made, my doubt that this did not exist independently of the statute (*ante*, p. 245) has not been removed. The cases cited in *Regina v. Lavin*, 12 P.R. 642, do not seem wholly to support the proposition. Those cited in Paley on Convictions, 8th ed., p. 359, for the proposition—"It (a warrant of commitment) cannot be amended like the information, but, if there is any error in it, a fresh commitment may be lodged with the governor of the prison"—are all cases in which the new warrant was so lodged before the return.

In *Ex p. Cross* (1857), 26 L.J.M.C. 201, there had been a bad warrant, but, before the rule for the writ had been obtained, a

good warrant was lodged. In *Ex p. Smith* (1858), 27 L.J.M.C. 186, the commitment was (see p. 187) 30th March, the new warrant 12th April, the return 14th April, setting forth, as in the *Cross* case, both warrants. So also in *Regina v. Richards* (1844), 5 Q.B. 926. The remark in *Shuttleworth's Case* (1846), 9 Q.B. 651, at p. 658, of Coleridge, J., "The case is somewhat analogous to that of an insufficient commitment, where, if we are satisfied that the party ought to be committed, we recommit," does not carry the case much if any further, referring, as it does, to such cases as *Rex v. Marks* (1802), 3 East 157. And Channell, B., in *Re Timson*, L.R. 5 Ex. at p. 261, points out the distinction between such cases as *Re Timson* and *Regina v. Chaney*, on the one hand, and *Rex v. Taylor* (1826), 7 D. & R. 622, on the other, and the non-applicability of the last-named case to facts like the present. The remark of Mr. Justice Osler in *Rex v. Whitesides* (1904), 8 O.L.R. 622, at p. 628, is *obiter* and not necessary for the decision.

I see no reason, however, to change the opinion I had formed when I considered the case previously, *ante* at p. 245. That has been strengthened by the case of *Rex v. Morgan*, 5 Can. Crim. Cas. 63, 272, 2 O.L.R. 413, 3 O.L.R. 356, not cited upon the argument. In that case the prisoner was charged for that he did "pick the pocket" of a person named, and he was brought before the police magistrate at Barrie. Electing to be tried summarily under what is now Part XVI., he was convicted of having "attempted to pick the pocket" of a person named, and sentenced to the central prison for six months. No warrant of commitment was made out, but the conviction was lodged with the gaoler at the central prison as the warrant for his detention there. Writs of *habeas corpus* and *certiorari* were issued, and his discharge asked for. Mr. Justice Street says (2 O.L.R. at p. 415): "I think there should have been a warrant of commitment, although the Code is silent upon the point, and no form is given. The conviction in the gaoler's hands is an extremely informal warrant; but, there being an offence proved, and a proper conviction for the offence, and absolutely no merits in the application, I exercise the power conferred on me by sec. 752 (now sec. 1120) of the Code, and direct that the prisoner be further detained under the present proceedings, and that the police magistrate before whom he was convicted do issue a proper warrant of com-

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mitment and lodge it with the gaoler of the central prison on or before the 1st day of November, 1901. . . ." An appeal was taken to the Court of Appeal—Armour, C.J.O., MacLennan, Moss (now C.J.O.), and Lister, J.J.A. The appeal was dismissed. The only Judge in that Court who mentions the matter now under consideration is Armour, C.J.O., who (3 O.L.R. at p. 359) says: "If a formal commitment were necessary, the learned Judge did right, there being a valid conviction, in allowing a formal commitment to be lodged."

While I may not be technically bound by these judgments ("upon questions of *habeas corpus*, it is a well-known rule that each Court is accustomed, and indeed considers itself bound, to exercise jurisdiction according to its own view of the law:" *per* Channell, B., in *Re Timson*, L.R. 5 Ex. 256, at p. 261), I accept them as setting out the law accurately, expressing, as they do, my own opinion.

There are two matters upon which, in refusing the application, I would express my regret. The first is that apparently there is no provision for the costs of the Attorney-General or his representative. I have already in *Rex v. Leach* (1908), 17 O.L.R. 643, at p. 672, given my views as to such costs—views to which I adhere.

The second is that only two years' imprisonment can be inflicted for this heinous offence. One who administers physical poison so as to inflict upon another grievous bodily harm is liable to 14 years' imprisonment; one who administers mental and moral poison, and thereby inflicts grievous harm upon the mind and soul, even if this is not possibly, indeed probably, accompanied by bodily harm as well, is let off with two years—rather a reversal of the injunction not to fear them that kill the body and after that have no more that they can do.

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[DIVISIONAL COURT.]

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Mines and Minerals—Staking and Recording Claim—Appeal—Status of Appellant—Mining Recorder—Appeal from Decision of—Dates Set out on the Record—Acceptance of—Order of Mining Commissioner Extending Time for Appeal—Constitutional Law—Legislation Authorizing Appointment of Mining Commissioner with Powers of Judge—Costs—Attorney-General.

M., a licensee who had staked out a mining claim, on the following day took up the stakes, obliterated the markings, and restaked; and subsequently recorded on the last staking:—

Held, that his right to the claim was barred under sec. 136 of the Mines Act, 1906, 6 Edw. VII. ch. 11(O.), as amended by sec. 36 of 7 Edw. VII. ch. 13(O.), for not having recorded on the first staking; and therefore he had no status to call in question the claim of D., another licensee.

Re Cashman and Cobalt and James Mines Limited (1907), 10 O.W.R. 658, followed.

Semble, per RIDDELL, J., that on the evidence D. was properly entitled to the claim, even if M. had a status to attack it.

The notice of appeal from the decision of a mining recorder had the mining recorder's indorsement thereon of its having been filed on the 24th of the month. The notice stated—as also did an order made by the mining commissioner extending the time for appealing and for substitutional service—that the date of the recording of the decision was the 10th of the month.

On an appeal to a Divisional Court from the mining commissioner's order extending the time, etc.:—

Held, that the date so stated of the recording (and not a prior date contended for by the appellant), as also the date so stated of the filing of the appeal, being matters of record, should be accepted, so that the appeal was taken within the fifteen days allowed by sec. 75 of the Act.

Held, also, that under sub-sec. 2 of sec. 75 the mining commissioner could properly make the order extending the time, etc., and could do so on the appellant's *ex parte* application.

The appeals were therefore dismissed with costs, except—RIDDELL, J., dissenting—that no costs were allowed to the Attorney-General; but, per FALCONBRIDGE, C.J.K.B., and BRITTON, J., without prejudice to any action or proceeding taken or to be taken by the appellant to test the jurisdiction of the mining commissioner, or the validity of the Act of the legislature authorizing the appointment of such an officer with the powers of a Judge; RIDDELL, J., not dealing with the matter, in view of the decision of the majority of the Court to leave the matter open, though intimating that, in his opinion, the legislation could not be successfully attacked.

Decisions of the mining commissioner affirmed.

THESE were two appeals by J. D. Munro from orders made by the mining commissioner.

The first appeal was from an order holding that the respondent, Lawrence Downey, was properly recorded as the holder of mining claim M. R. 386, formerly known as T. R. 446, in the Montreal

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River mining division situate in the unsurveyed portion of the Temagami forest reserve.

The second appeal was from an order extending the time for Downey to appeal from a report made by one Burrows, a mining inspector, and for substitutional service, because at the time the said order was made there was no right to appeal, the fifteen days allowed by the Mines Act 1906, 6 Edw. VII. ch. 11 (O.), as amended by sec. 25 of 7 Edw. VII. ch. 13 (O.), to appeal, having expired, and because the order should not have been made *ex parte*.

Notice was also served that the appellant would on the argument contest the jurisdiction of the mining commissioner, in that the Ontario Legislature had exceeded its powers in constituting such an officer.

The facts are stated in the judgment of RIDDELL, J.

On April 22nd, 1909, the appeals were heard before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. M. Douglas, K.C., and *J. P. MacGregor*, for the appellant.

G. F. Shepley, K.C., for the respondent.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

July 29. BRITTON, J.:—This was an appeal from the order or judgment of the mining commissioner for Ontario, dated the 20th April, 1908.

The argument in this case was very careful and complete.

After a perusal of the evidence, specially considering those parts of it referred to in a memorandum furnished by counsel, I am unable to say that the learned mining commissioner is wrong, either in his findings upon questions of fact or in his construction and application of sec. 136 of the Mines Act.

It is right for me to say that, from reading the evidence, I would not form so unfavourable an opinion as to the truthfulness of Munro as the commissioner has formed. That may be, in part, explained by what the commissioner calls "the hesitating and evasive way in which Munro gave his evidence." The manner of a witness in the box is something which the trial Judge may consider and which the appellate Judge cannot, and so it is always more difficult on that account to interfere.

The appeal should be dismissed with costs, but without prejudice to any action or proceeding that the appellant has taken or may take to question the jurisdiction of the mining commissioner or the validity of the Act of the Legislature of the Province of Ontario authorising the appointment of an officer with the powers of a Judge.

There should be no costs to the Attorney-General of the present appeal.

SUBSIDIARY APPEAL.

The mining recorder of the Montreal River mining division decided that the report of Inspector Burrows respecting the alleged discovery of Munro, on M. R. 386, in the Temagami forest reserve, operated as an allowance of said discovery, as a good and *bonâ fide* discovery of mineral.

Downey, as the licensee and recorded holder of the said mining claim, desired to appeal against that decision of the mining recorder, as he had a right to do, under sec. 74 of the Mines Act, 1906. Such an appeal must be taken within fifteen days from the record of such decision in the books of the recorder's office: sec. 75.

Downey had notice of appeal prepared, dated the 22nd February, 1908, and it appears before us as an original document, with the indorsement signed by the mining recorder that a copy was filed in his office on the 24th February, 1908.

That notice states that the decision of the mining recorder was entered in the books of his office on the 10th February, 1908.

That notice, coming now from the office of the mining recorder, must be taken as a matter of record—that the decision was recorded on the 10th February, 1908, and that the notice of appeal was given, to the extent of filing a copy of such notice in the office of the mining recorder, on the 24th of the same month.

The notice is required to be served before the appeal would be properly before the mining commissioner.

On the 28th February, 1908, on the *ex parte* application of Downey, the mining commissioner made an order extending the time for appealing until the 10th March, and giving directions for service of a copy of the order and a copy of the notice of appeal.

From this order of the mining commissioner of the 28th February, 1908, Munro appeals, on the ground that the mining commissioner

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had no jurisdiction to make it; and that if he had jurisdiction, it should not have been exercised upon the *ex parte* application of Downey.

If the mining commissioner had jurisdiction to make the order, an appeal cannot succeed merely because he did not hear the person against whom the appeal was taken.

Upon the argument and upon the fair consideration of sub-sec. 2 of sec. 75 of the Mines Act, it was practically conceded that if the decision of the mining recorder, which was appealed against, was in fact recorded in the books of the mining recorder on the 10th, and if a copy of the notice of appeal was in fact filed with the mining recorder on the 24th February, 1908, this appeal must fail.

In addition to what appears in the notice of appeal filed as to date of record of decision, the order itself states the date as the 10th February.

In my opinion, we are bound to accept these dates—the 10th February as to recording the decision and the 24th February as to filing copy of notice of appeal. This is now matter of record, incontrovertible for the purpose of this appeal. If the insertion of either date was a mere clerical error, it could be corrected by the mining recorder; but it was argued, on behalf of the present appellant, Munro, that the 8th February was the true date of recording the decision.

That contention cannot succeed in the face of the record.

Sub-section 2 of sec. 75* seems clear that the mining commissioner, when the notice of appeal has been filed with the mining recorder within the fifteen days from the record of the decision, if “he is satisfied that it is a proper case for appeal, and that after reasonable efforts the adverse parties or any of them could not be served within the time mentioned, may, either before or after the time so limited, make such order as he deems just for substitutional or other service upon such adverse parties.”

The appeal was complete as a mere appeal except service, and the order of the 28th February may be treated as an order for the service required by sub-sec. 1 of sec. 75.

The appeal should be dismissed with costs.

* This sub-section is added by sec. 25 of 7 Edw. VII. ch. 13 (O.)

RIDDELL, J.:—This matter is a sort of sequel to the case of *Re Blye and Downey* (1908), 11 O.W.R. 323, 12 O.W.R. 986. It turns upon facts and law.

The chronology is:—

On the 27th February, 1907, one Lovell, as he claims, made a discovery of valuable mineral on what is now M. R. 386 (formerly T. R. 446), in the Montreal River mining division, situate in the unsurveyed portion of the Temagami forest reserve.

The 5th March is the date of an application by Blye for this, which was received and entered by the mining recorder as of the 8th March, and the claim for inspection stood.

On the 17th August Inspector Murray having inspected the claim, made his report that there was no discovery within the Act, but that the claim was staked, blazed, etc., as required by the Act.

On the 20th August the mining recorder entered the report, and marked in the record "cancelled."

On the 21st August the mining recorder posted the notice of cancellation in his office, and notified Blye's agent according to the statute.

This alleged discovery is near the north end of the claim, and is said to have been made by Lovell and the present litigant, Munro, together, acting for Blye, Lovell apparently for wages, Munro for a one-fifth interest.

No development or other work had been done following this application; and on the 19th August Munro, intending to acquire the claim for himself, went on the claim (he actually arrived on Sunday the 18th), and began to prospect in the vicinity of his former alleged discovery. Apparently even before this time he had expected that the Blye claim would be cancelled as soon as the report of the inspector was put in, and that this cancellation might be expected to occur about the 20th or the 21st. On the morning of the 19th he examined the old staking, and in the afternoon he worked at the old discovery. On the 20th August Munro still worked at the same vein, and at night went to his tent. Lovell and one Kilroy arrived during the day.

On the 21st August Munro "cleaned out the loose rock," "mucked it out and picked it out," and that morning, at 10.30 a.m., he set up a post—"a regulation discovery post." He then

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came down to his tent, near post No. 3 on H. F. 1 (a claim west of this), and after dinner went back to the discovery and worked at it again. Munro swears that his idea was that the claim would be thrown open for non-development; that he would get in the claim first, "and develop the lot;" to stake it again, if necessary (as he believed it would be), immediately it was thrown open.

On this 21st, as he says, he staked the lot on his alleged discovery of 10.30 a.m. of that day.

On the 22nd August Munro started "to develop the vein or shew it up a little more," and restaked. He took down the stakes, cut the dates off with a knife, and replaced them. He thought it necessary to pull up the stakes "to fulfil the law"—i.e., to abandon the staking theretofore made—and this he did with discovery post as well—"the lifting up was to do away with it." These stakes of the 22nd August purported to be made pursuant to a discovery of the 22nd August at 9.30 a.m.

Now, to go back: on the 20th August Downey and his associates, at about 4.30 p.m., made a valuable discovery at a different part of the claim—a discovery which the mining commissioner says "is, no doubt, the cause of the strenuous contest now taking place over the ownership of the claim." Downey saw the discovery the same evening, and kept one Shane working, as required by sec. 135 of the Act, in order to protect it for staking, etc. A discovery post was planted on the afternoon of the 21st August, and the staking completed on the 22nd August in the afternoon. On the 22nd August Downey filed his claim, claiming discovery as of the 20th August, and staking as of the 22nd August. On the 28th August Munro filed his claim, discovery as of the 22nd and also staking of the same day. On the 7th September Munro filed his dispute. On the 9th Inspector Irwin filed his report allowing the Downey and disallowing the Munro discovery.

Another inspection was asked for by Munro; and upon another inspection Mr. Burrows made a special report, dated the 7th December, 1907 (which was entered in February, 1908, being noted in the record of the Downey claim), in which he says that he found, about five feet from the bottom of a shaft, ten or twelve feet deep, what would pass inspection under the Act.

This appears to have been entered in the Downey claim on the 10th February, 1908; but it is suggested before us that the

real date is the 8th February. Apparently this suggestion is made for the first time upon this appeal.

On the 20th February a notice of appeal was lodged by Downey against the act of the mining recorder in so entering this report, and in deciding that such report operated as an allowance of Munro's discovery.

Finding it impracticable to serve notice of appeal, an order was obtained on the 28th February *ex parte* by Downey from the mining commissioner for substitutional service, and extending the time for appealing.

On the 13th March an appeal was taken from this order to the Divisional Court to sit on the 6th April, and this appeal, so long delayed by the parties, is the second of the present appeals.

Munro's dispute of Downey's claim was, on the 10th December, 1907, transferred to the mining commissioner for trial and adjudication.

On the 13th February this came on for trial before the mining commissioner, who on the 20th April disallowed the objections of Munro, and affirmed the right of Downey.

On the 4th May an appeal was taken from this adjudication to the Divisional Court sitting on the 1st June, 1908, and this now comes on for argument, the first of the above appeals.

As to the second of the appeals, it is not disputed that if the notice was in fact filed with the mining recorder within the period limited—viz., fifteen days from the record of the decision of the mining recorder—the order cannot be successfully attacked; but the claim is now made that the record of the decision by the mining recorder was in fact on the 8th. The respondent admits that if as a fact this entry was on the 8th, the order cannot stand.

I do not think we ought to preclude the appellant from shewing, if he can, upon the trial of the matter, if there is one, that the entry was in fact upon the 8th. Neither should we, upon a bare suggestion, without anything which can be called proof, set aside this order. The proper order, in my view, to make is to dismiss the appeal with costs—the dismissal to be without prejudice to an application to the mining commissioner to set aside his order on the ground that the notice of motion was filed too late.

In respect of the main appeal, the mining commissioner has held that the act of Munro in cancelling, as he did, all staking based upon the discovery of the 21st August, and not proceeding

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upon this discovery and staking, disqualified him under sec. 136 of the Act.* This section, whatever its object may be, is an extraordinarily stringent one, and, desirous as I am, to decide that Munro has not brought himself under its ban, if such a decision were possible, I am unable to see any loophole for him. We must take the words of the Act as they are, and, taken as they are, it is, I think, clear that Munro is barred. He has failed "to record . . . with the mining recorder as and within the time by this Act provided," and accordingly he cannot "in any way . . . acquire any right or interest" in the claim.

For this reason he can have no interest in this appeal, and *Re Cashman and Cobalt and James Mines Limited* (1907), 10 O.W.R. 658, applies.

The appeal should be dismissed with costs.

I may add that I see no reason for doubting that Downey's claim is perfectly good, even if Munro had a status to attack it.

The appellant served notice that he would contend, upon the argument, that the mining commissioner had no jurisdiction in the premises, because the local Legislature acted beyond its powers in constituting such an office.

This contention was not pressed upon the argument, and, in my opinion, could not be successfully urged. I thought we should dispose of the point, but, as the remainder of the Court decided that the matter might be left open, I pay no further attention to it, except to say that the Attorney-General, having been served with notice and attending to argue, should have his costs: *Attorney-General v. Toronto General Trusts Corporation* (1903), 5 O.L.R. 607; *Rex v. Leach* (1908), 17 O.L.R. 643, at pp. 671, 672.

FALCONBRIDGE, C.J., concurred with BRITTON, J.

G. F. H.

*By sec. 36 of the Act of 1907, sec. 136, as contained in the Mines Act 1906, was repealed, and the following section substituted:—

(1) Any licensee who, no matter with what purpose or intent, plants or places any stakes, posts or markings not authorized by this Act upon any lands . . . open to prospecting . . . and any person who stakes out or partially stakes out, whether authorized by this Act or not, any such lands . . . and fails to record the same, or to complete and record the same, with the mining recorder as and within the time by this Act provided, shall not, subject to the next sub-section, thereafter be entitled to again stake out the said lands or any part thereof or to record a claim thereon, or in any way to acquire any right or interest therein.

Sub-section (2) provides for the licensee giving notice to the mining recorder and procuring from him a certificate relieving him from the provisions of sub-sec. (1).

[IN THE COURT OF APPEAL.]

BANK OF BRITISH NORTH AMERICA V. E. D. WARREN & Co.

C. A.

Banks and Banking—Crediting Customer with Amount of Cheque—Negotiation—Holder for Value—Dishonour of Cheque—Honouring Subsequent Cheques—Bills of Exchange Act, secs. 22, 54, 56, 58, 70, 74, 165.

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The account of M. at the plaintiffs' bank was \$409.53 overdrawn. On May 23rd he posted to the plaintiffs from Chicago a cheque of W. & Co. for \$1,000, dated May 16th, with instructions to place the amount to his credit, which the plaintiffs did on receipt on May 26th, thus leaving a credit balance in M.'s favour of \$590.47. On the same day the plaintiffs sent this cheque for collection to the clearing house, but it was returned dishonoured on May 27th, W. & Co. having stopped payment on May 23rd. On May 28th certain cheques drawn by M. on his account came in, which the plaintiffs paid and charged up. The plaintiffs again twice sent the \$1,000 cheque to the clearing house, but it was on each occasion returned unpaid, the plaintiffs on each occasion crediting and debiting M.'s account with the \$1,000. The plaintiffs now sued W. & Co. on the \$1,000 cheque. It was admitted that M. had not given consideration for it, and that, if he were holder, he could not recover on it:—

Held, that the plaintiffs, by crediting M.'s account with \$1,000 on receipt of the cheque sued on, became holders for value of the latter. The position of the plaintiffs, with reference to the cheque sued on, became fixed when the latter was negotiated to them, and nothing which took place subsequently altered the plaintiffs' position, except that by the dishonour of the cheque and notice to M. his liability in respect to it became absolute, having previously been only conditional.

Held, also, that the interval between May 16th, the date of the cheque, and May 23rd, the date of its being mailed to the plaintiffs, was not, in the circumstances, sufficient to give the cheque the character of an overdue bill, so as to make it, under sec. 70 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, subject in the plaintiffs' hands to any defect of title affecting it.

Held, also, that sec. 22 of the Bills of Exchange Act applies to cheques. Judgment of MULOCK, C.J. Ex.D., varied.

THIS was an action to recover \$1,000, in the circumstances stated in the judgments.

The action was tried before MULOCK, C.J.Ex.D., without a jury, at Toronto, on November 5, 1908.

G. L. Smith, for the plaintiffs.

F. Arnoldi, K.C., for the defendants.

November 30. MULOCK, C.J.:—This is an action to recover payment of \$1,000, the amount of a cheque bearing date May 16th, 1908, drawn by the defendants upon the Traders Bank of Canada, and payable to one H. H. Muggley, and by him indorsed to the plaintiffs, under the following circumstances: Muggley had a current bank account with the plaintiffs, which, on May 26th, 1908, was overdrawn to the extent of \$409.53. On that

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day, and whilst the account was so overdrawn, the plaintiffs received the cheque in question by letter from Muggley, then in Chicago, with a request that they would place it to his credit. This they did on May 26th, whereupon his debit balance of \$409.53 appeared as changed to a credit balance of \$590.47. The cheque, having been sent through the clearing house for payment, was, on May 27th, returned to the plaintiffs with the intimation that payment had been stopped. It was then charged up against Muggley's account. On May 28th a cheque for \$345, drawn by Muggley on the plaintiffs, was presented for payment and paid, and charged against his account, and on May 29th another cheque for \$86.75 drawn by Muggley on the bank was also presented and paid and charged against him. After the first return of the cheque sued on, the plaintiffs twice sent it, through the clearing house, for payment, but it was each time returned unpaid. At the trial it was admitted by the plaintiffs that Muggley had not given consideration for the cheque, and that if he were holder he could not recover upon it. As to the plaintiffs, the cheque being a bill of exchange—*McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95—failure of consideration on Muggley's part cannot prevail as against them, if they became holders in due course.

The defendants, however, say that the plaintiffs gave no consideration for the cheque. I am unable to assent to this contention. They received it from their debtor with the request that they would place, not the proceeds when obtained, but the amount called for by the cheque, to his credit. This they did, and such action operated as a conditional payment of Muggley's indebtedness, and until dishonour of the cheque the plaintiffs' cause of action against Muggley was suspended: *Belshaw v. Bush* (1851), 11 C.B. 191, 199. This giving of time in respect of an existing debt constituted a valuable consideration. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other: Com. Dig. Action on the case, Assumpsit, B. 1-15."

This was the view expressed by the Court of Exchequer in *Currie v. Misa* (1875), L.R. 10 Ex. 153, and, although the final judgment pronounced in that case (1 App. Cas. 554) was based on other grounds, there was no dissent from the view of the law as laid down in the Court below.

There was also the further consideration that the crediting of the cheque created a credit balance of \$509.47 in Muggley's favour, which amount he might have drawn out before the cheque was dishonoured and charged against his account. I am therefore of opinion that for each of these reasons the plaintiffs gave valuable consideration and became holders of the cheque in due course, and as creditors of Muggley have a beneficial interest in the amount of the cheque to the extent of the said sum of \$409.53.

It was also urged by counsel for the defendants that the interval of time between the date of the cheque (May 16th) and its receipt by the plaintiffs (May 26th) was so great as to impart to it the character of an overdue bill when received by the plaintiffs, and that therefore they took it subject to any of its original imperfections. Muggley, on May 23rd, which was a Saturday, enclosed the cheque in his letter of that date to the plaintiffs at Toronto. The following day was Victoria Day, a statutory holiday, but, falling on Sunday, Monday the 25th became a statutory holiday, and it was not until the morning of the 26th that the plaintiffs received the cheque. Still it had been mailed to them in Chicago on May 23rd, and the delay in its transmission was not a circumstance to create any suspicion on the part of the plaintiffs. The only question is whether the delay between the date of the cheque (May 16th) and the date of its mailing, namely, May 23rd, was sufficiently great to stamp the cheque conclusively as an overdue bill. The lapse of time, between the date and presentation of a cheque is only one circumstance to be taken into consideration. For all that appeared to the plaintiffs the cheque might have been sent by the drawers to Muggley in Chicago, a circumstance that would account for part of the delay in its transmission to the plaintiffs. It was regular on its face, was drawn by a business firm in favour of one of the bank's customers, and by him sent in the ordinary way of business to his banker to be deposited to the credit of his account. There was nothing in any or all of these circumstances to awaken suspicion that the cheque had been given without consideration, nor was the interval of time between its date and transmission sufficiently unreasonable to give it the character of an overdue bill. What would be unreasonable delay is in each case a question of fact, and circumstances may in one case justify a delay which under other circumstances would be unreasonable:

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London and County Banking Co. v. Groome (1881), 8 Q.B.D. 288. Under the circumstances of this case I find as a fact that there was no unreasonable delay in the transmission of the cheque to the plaintiffs, and that in good faith they received and placed it to their customer's credit in his current account with them. When payment was refused, the cheque was charged against Muggley's account, and it was urged that this action deprived the plaintiffs of any beneficial interest in it, but I am unable to assent to this contention. The bank, having become holders of the cheque in due course, were entitled to hold it as collateral security for their customer's debt, which had never been paid, and the only legal effect, if any, of their charging it against his account was to remove the extension of time given him for payment of his indebtedness.

The remaining question is whether the plaintiffs are entitled to hold the cheque as security for the amount of the two cheques of \$345 and \$86.75.

When the defendants' cheque was dishonoured, the plaintiffs' claim thereon was limited to \$409.53.

If the defendants had then paid that sum they would have been entitled to have their cheque delivered up to them. Such was their right at that time, and their liability cannot be enlarged by reason of further credits given by the plaintiffs to Muggley after dishonour of the cheque. As to such credits, the plaintiffs in respect of the defendants' cheque are not *bonâ fide* holders without notice.

The judgment, therefore, will be in favour of the plaintiffs for \$409.53 only, with interest and costs of the action.

The plaintiffs appealed to the Court of Appeal from this judgment, and the defendants cross-appealed.

The appeal and cross-appeal were argued on April 27th, 1909, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, J.J.A.

G. L. Smith, for the plaintiffs, contended that the bank gave value for the cheque sued on, and were entitled to recover the whole amount of it: Bills of Exchange Act, R.S.C. 1906, ch. 119, secs. 53, 56; that the bank had no knowledge of the transactions between Muggley and the Traders Bank; that the fact that the cheque in question was made payable to Muggley and not to Muggley or order made no difference: Bills of Exchange Act, sec. 22. He referred to *Currie v. Misa*, L.R. 10 Ex. 153; *Ex p. Richdale*

(1882), 19 Ch.D. 409, 416; *Halwell v. Township of Wilmot* (1897), 24 A.R. 628; *Cross v. Currie* (1880), 5 A.R. 31; Paget's Law of Banking, 2nd ed., p. 305; *National Bank v. Silke*, [1891] 1 Q.B. 435; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715.

F. Arnoldi, K.C., for the defendants, contended that Muggley got the cheque by a gross fraud, and could not have recovered on it: Bills of Exchange Act, sec. 58, sub-sec. 2; that the onus was on the plaintiffs to establish title, and there was no presumption in their favour; that the cheque, being dated May 16th, and not received by the plaintiffs till May 26th, the plaintiffs should have inquired and taken steps to ascertain whether the cheque was good; that no notice was given by the plaintiffs to Muggley that the cheque had been received and placed at his credit; and that the plaintiffs were not holders in due course, but mere custodians of a piece of paper. He cited *London and County Banking Co. v. Groome*, 8 Q.B.D. 288, at p. 295; *Down v. Halling* (1825), 4 B. & C. 330; *Rothschild v. Corney* (1829), 9 B. & C. 388; *Sawyer v. Thomas* (1890), 18 A.R. 129; *Cohen v. Hale* (1878), 3 Q.B.D. 371; *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95; Falconbridge's Law of Banks and Banking, at pp. 479, 495, 614; Bills of Exchange Act, secs. 85, 166.

Smith, in reply, referred to Bills of Exchange Act, sec. 91.

June 23. The judgment of the Court was delivered by MACLAREN, J.A.:—This is an appeal and cross-appeal from a judgment of Mulock, C.J. The bank sued as the holders of a cheque for \$1,000 drawn by the defendants upon the Traders Bank in favour of one Muggley. The action was maintained to the extent of \$409.53, the amount due by Muggley to the plaintiffs when they received the cheque from him. The plaintiffs claim judgment for \$1,000; the defendants contend that the action should have been dismissed entirely.

The defendants say that the cheque was not negotiable, and the plaintiffs have no title. This is based on the fact that it was made payable to "H. H. Muggley" simply, and not to his order. Section 22 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, declares that a bill is payable to order which is made payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. No such

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words appear on this cheque. Under sec. 165 of the Act, a cheque is a bill of exchange drawn on a bank; the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. There is nothing to take a cheque out of the provisions of sec. 22, so that this ground of defence fails.

The defendants also say that the bank are not holders in due course, having received the cheque only after it was overdue. A holder in due course is defined in sec. 56 of the Act as one "who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (a) that he became the holder of it before it was overdue; . . . and (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Was this cheque overdue when the bank received it? The facts are these: Muggley was a customer of the bank, and, his account being overdrawn in the early part of May, 1908, to the extent of \$409.53, the bank were pressing him for money. He wrote them from a hotel in Chicago on May 23rd: "Enclosed find cheque No. 251, Traders Bank, E. D. Warren & Co., for \$1,000; kindly place same to my credit." May 24th, Victoria Day, being a Sunday, Monday the 25th was kept as a holiday, and on the morning of the 26th the bank received the cheque, and at once, as requested, placed the full amount to his credit, covering his overdraft, and shewing a balance of \$590.47 to his credit. On the 26th it was sent for collection through the clearing house, and on the 27th returned dishonoured, as the defendants had on the 23rd stopped payment of it.

Under sec. 70 an overdue bill can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it. A cheque or other bill payable on demand is deemed to be overdue for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for such purpose is a question of fact.

This case was tried without a jury, and the trial Judge found as a fact, on the evidence, that the cheque had not been in circulation an unreasonable length of time. It was drawn on a Saturday in

favour of a Toronto business man, who, being temporarily in Chicago, sent it from his hotel there the following Saturday in the letter above copied. There was no delay after this. The cases go to shew that even a longer delay than here without any surrounding suspicious circumstances has not been considered sufficient to make a cheque stale or overdue. In my opinion, the finding of the trial Judge was quite right in the circumstances, and no valid ground was given for our overruling it. See *London and County Banking Co. v. Groome*, 8 Q.B.D. 288, and Daniel on Negotiable Instruments, sec. 1634.

Section 58 of the Act provides (2) that "every holder of a bill is *prima facie* deemed to be a holder in due course; but if, in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course."

The defendants set up as a defence that the cheque was obtained by Muggley from them by fraud and without consideration, and at the trial the bank admitted that Muggley could not recover on the cheque. This shifted to the bank the onus of proving that they had given value in good faith. The good faith of the bank was not questioned; but it was contended that their placing to Muggley's credit the amount of the cheque and subsequently debiting his account with the cheque when it came back dishonoured was not a giving of value.

By sec. 2 (j) of the Act "value" means "valuable consideration;" and by sec. 53, "valuable consideration for a bill may be constituted by,—(a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability; such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time."

Here there was not only the antecedent debt, but also the giving of time or forbearance, which of itself has been held to be a sufficient consideration to support a simple contract. The *quantum* of the consideration cannot be raised by a third party, except only in so far as its insufficiency might in certain circumstances be evidence of notice of defect of title or of want of good faith. Credit was

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given to Muggley for the full face of the cheque, and by treating the cheque as a deposit or conditional payment of so much money, the bank were estopped from suing him for the amount of his overdraft until the cheque was dishonoured, when they had the right to charge it back to him, as he had by indorsing it guaranteed its payment, and on its dishonour had become primarily liable upon it. The shortness of the time for which the forbearance or suspension of the right to sue existed does not prevent its being a valuable consideration within the meaning of the section. See *Currie v. Misa*, L.R. 10 Ex. 153; Leake on Contracts, 5th ed., p. 7.

This doctrine has also been clearly laid down by the Court of Appeal in England. In a similar case, *Ex p. Richdale*, 19 Ch.D. 409, at p. 417, Jessel, M.R., said: "Alfred Palmer paid the cheque to his bankers, and they placed the amount of it to the credit of his current account. The bankers were the holders of the cheque for value; the moment they credited the amount of it to Alfred Palmer it became their property." It is true that this case was prior to the passing of the Imperial Bills of Exchange Act; but it was approved by the same Court in a case under the Act, *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715, where Lord Esher, M.R., says, at p. 717: "One defence in this case is that the bank gave no consideration for the cheque; but this point is determined against the defendant by the decision of the Court of Appeal in *Ex p. Richdale*. When the bank received the cheque from Mrs. Monson, they did so on an undertaking to give her credit to the amount of the cheque on her general account. This they did, and giving such credit is sufficient consideration between a bank and a customer. Consequently the bank were holders for value." See also the remarks of Kay, L.J., to the same effect, on p. 718, and as to the debiting of the cheque when dishonoured, as in this case, on p. 719. Section 53 of our Act is an exact copy of sec. 27 of the Imperial Act, under which *Royal Bank of Scotland v. Tottenham* was decided.

Value having been once given for the bill, the holder is deemed to be a holder for value as regards all parties to the bill who became parties prior to such time: sec. 54.

The evidence shews that the bank sent the cheque in question for collection through the clearing house also on May 30th and June 4th, on each occasion crediting Muggley's account with the \$1,000 and debiting him with the amount when it was returned dishonoured.

The bank also subsequently paid three cheques of his which aggregated \$456.75. I am of opinion that none of these circumstances, however, had any legal effect upon the position of the parties. The bank must stand or fall on their rights as they existed when they became the holders on the morning of May 26th. I do not see that their action in subsequently honouring Muggley's cheques can be looked at as affecting the defendants, except possibly as shewing belief in the position that they were the holders of the cheque and could look to the defendants for its payment.

It was also alleged by the defendants that in an interview between Mr. Warren and the manager of the plaintiff bank the latter said to him that he had nothing to do with them. Mr. Warren says: "I thought he meant he had nothing to do with E. D. Warren & Co. He would not look to us for it. He would look to Mr. Muggley." The bank manager had no recollection of the interview. The point was not very strongly urged upon us. But, even if it went much farther, it would not be sufficient to release the defendants from liability. The holder of a bill may renounce his rights against any party to it, but this must be in writing unless the bill is delivered up, neither of which took place here: see sec. 142.

The learned trial Judge held that on crediting Muggley with the amount of the cheque the bank became holders in due course of the cheque; but that when the cheque came back dishonoured, and the bank charged it up to Muggley, they thereafter held it only as collateral security for the amount which Muggley owed, and that if the defendants had then paid the bank that sum they would have been entitled to have their cheque delivered up to them.

While I fully agree with the first of these positions, I find myself, with great respect, unable to agree with the latter part. I think the position of the bank with reference to the cheque became fixed when the cheque was negotiated to them, and that nothing which took place subsequently altered their position, except that at that time Muggley was only conditionally liable to them, and by the dishonour of the cheque and notice to him his liability became absolute.

Paget, in his work on Banking, 2nd ed., discusses this question in ch. 19, and says that where a banker takes a cheque, bill, or note for value, there is no question of lien. If he receives it in reduction of an ascertained overdraft, or if he credits it as cash,

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the absolute property vests in him, and so excludes lien. He goes on to say, p. 306: "But he acquires the higher rights of a transferee for value. He can sue for the full amount of the instrument, because in the case of a holder for value the Court will not go into the *quantum* of the consideration."

The bank continued to be holders in due course, and as such holders had by sec. 74 the right to sue on the cheque in their own name, and by that section they held it free from any defect of title, and from all personal defences, and became entitled to enforce payment in full against all parties liable on it. When they recovered the whole or any part of the amount of the cheque, they were bound to place the same to the credit of Muggley, as the cheque was negotiated to them on that condition. The admission made by the bank at the trial that Muggley could not recover from the defendants on the cheque did not in any way bind Muggley, and was only for the purposes of this suit. If the bank were, as they asserted, holders in due course, the admission could not hurt them; but in any event it could not possibly affect Muggley, as he is no party to this suit, and we have no right in his absence to deal with or dispose of his rights, or to take the account between him and the defendants. If a bank should give up to the drawer of a bill or the maker of a note which had been negotiated to or discounted by them, such bill or note, on receiving from the drawer or maker the amount due to them by the negotiator or discounters, they would frequently find themselves in trouble.

We are not in the present case called upon to consider or decide what is to become of the money after it has been collected by the bank. It may well be that the defendants may be able to shew that they are entitled to the balance of the money after the bank have been paid what is owing to them by Muggley; but that must be in a proceeding to which all those interested are parties, and should not be disposed of or dealt with in the present action.

The result is that the plaintiffs' appeal should be allowed, and the defendants' cross-appeal dismissed, both with costs; and judgment entered in favour of the plaintiffs for \$1,000, interest from the date of dishonour, and costs.

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[IN THE COURT OF APPEAL.]

McDONOUGH v. COOK.

Bills and Notes—Promissory Note—Irregular Indorsement—"Holder in Due Course"—Aval—Collateral Agreement—Estoppel—Statute of Frauds—Bills of Exchange Act, sec. 131.

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The plaintiff brought actions on two promissory notes, for \$6,000 and \$2,000 respectively, made by G. J. C. and W. C. K. as makers, and payable to the order of the plaintiff as payee. The notes were indorsed by the defendant J.S.C. before they were delivered to the plaintiff, who subsequently indorsed them. The notes were given in renewal of a note for \$8,000 between the same parties, which also had been indorsed by the plaintiff subsequently to the indorsement by J.S.C. By a sealed agreement of the same date as the \$8,000 note (21st May, 1907), which was executed by J.S.C. and the other parties, it was stated that the note was given as security for the price of certain mining claims purchased by him in company with G.J.C. and W.C.K. from the plaintiff, and that J.S.C. was "the indorser of the note:"—

Held, that J.S.C. was liable on the notes.

Per OSLER and MACLAREN, JJ.A., that J.S.C. was liable to the plaintiff as "to a holder in due course," within the meaning of R.S.C. 1906, ch. 119, sec. 131.

Robinson v. Mann (1901), 31 S.C.R. 484, followed.

J.S.C. was also liable to the plaintiff on the ground of estoppel, inasmuch as he was bound by the agreement of the 21st May, 1907, and it was not open to him to raise any defence based upon the irregular indorsement of the notes.

Per MEREDITH, J.A., that, upon the evidence adduced, J.S.C. had an interest in the lands as a principal as regards the plaintiff, and was liable to pay the contract price; and, even if his liability were only that of a surety for his co-defendants, the deed of the 21st May, 1907, was sufficient evidence of his contract under the Statute of Frauds.

Judgment of CLUTE, J., affirmed.

Two actions brought by Roderick McDonough against George J. Cook, W. C. Kilpatrick, and J. S. Crawford, on two promissory notes respectively made by the defendants Cook and Kilpatrick, payable to the order of the plaintiff and indorsed by the defendant Crawford. The statement of claim in each case alleged that the defendants Cook and Kilpatrick had entered no appearance in the actions, and that judgments had been duly entered against them, which still remained unpaid and unsatisfied. The other facts are stated in the judgments.

The actions were tried together before CLUTE, J., without a jury, at North Bay, on the 15th April, 1908.

J. McCurry, for the plaintiff.

J. B. Bartram, for the defendant Crawford.

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April 21, 1908. CLUTE, J.:—The plaintiff seeks to recover against the defendant J. S. Crawford upon two promissory notes, dated the 9th August, 1907, for \$2,000 and \$6,000 respectively, made by the defendants George J. Cook and W. C. Kilpatrick, payable at one and two months to the order of Roderick McDonough, the plaintiff, and indorsed by the defendant Crawford. The plaintiff, the payee, did not indorse the notes until they were presented at the bank for payment, and then only for the purpose of protest. Judgment has been signed in each of the cases against the makers. These two notes were given as a renewal of an \$8,000 note, dated the 21st May, 1907, payable on the 22nd July after date, made by the same makers, payable to the order of the plaintiff, and also indorsed by the defendant J. S. Crawford—McDonough, the payee, not having indorsed the same until after Crawford. The last mentioned note was given as security for the payments under two agreements of the same date. Under the first agreement McDonough and others sold and transferred to W. C. Kilpatrick, one of the makers of the note, 21 mining claims for the price or sum of \$8,000, payable \$1,500 on the 22nd June, 1907, and \$6,500 on the 22nd July, 1907. The second agreement of the same date was made between the plaintiff, Roderick McDonough, and W. C. Kilpatrick, George J. Cook, and J. S. Crawford. Although it is not very clearly expressed, it would appear from the second agreement that McDonough acted as trustee to receive the purchase money for himself and the other parties interested.

This agreement contains the following clauses:—

“1. That as security for the making of said payments hereinbefore referred to, the said W. C. Kilpatrick, in addition to transferring certain mining stock, in company with George J. Cook and indorsed by J. S. Crawford, makes a promissory note for \$8,000, payable to the order of the said R. McDonough, two months after date, at the Bank of Ottawa, at Powassan.

“2. And it is further understood and agreed by the said R. McDonough and the said W. C. Kilpatrick, George J. Cook, and J. S. Crawford, that the said note for \$8,000 is given merely as security, and upon payment of the said \$1,500 on the 22nd June, and the \$6,500 on the 22nd July, 1907, the said note shall be delivered into the hands of the said J. S. Crawford without any further payment therefor than the above-mentioned payment of \$1,500 and \$6,500 respectively.

"3. And it is further understood and agreed between the parties hereto that in the event of the said J. S. Crawford, the indorser of the note, having to pay the same, the title to the said mining claims shall revert to him without any further payment therefor."

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This agreement was signed and sealed by all the parties, including Crawford. The only defence raised at the trial was as to the liability of Crawford. It was urged on his behalf that under the authority of *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, the defendant having put his name on the back of the note before it was indorsed by the plaintiff, the payee, he was not liable either as indorser or as surety or otherwise. Since the decisions in *Robinson v. Mann* (1901), 31 S.C.R. 484, and *Slater v. Laboree* (1905), 10 O.L.R. 648, *Canadian Bank of Commerce v. Perram* can no longer be considered an authority binding on this Court. In the *Robinson* case the Chief Justice, in delivering the judgment of the Court, held that sec. 56 of the Bills of Exchange Act, 1890, applied to an indorsement of this kind, and said that "by force of the statute the indorsement operated as what has long been known in the French commercial law as an 'aval,' a form of liability which is now by the statute adopted in English law." R.S.C. 1906, ch. 119, sec. 131, contains sec. 56 and the first clause of sec. 23 of the former Act, 1890. The two subsequent clauses of sec. 23—(a) and (b)—are now found in sec. 132 of the present Act. Section 131 now reads: "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: provided that when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers."

I do not see anything in the transposition of a part of sec. 23 to 56 to affect the decision in the *Robinson* case. It seems rather to strengthen the view of the law there taken than otherwise. In *Slater v. Laboree* the decision in *Robinson v. Mann* was followed.

I am therefore of opinion that, upon this ground, the defence fails. But I am also of opinion that, having regard to the facts of this case, the plaintiff is entitled to recover, even if *Canadian Bank of Commerce v. Perram* were still to be considered the law. It will be seen, on reference to the above statement of facts, that

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the present notes sued on were a renewal of the \$8,000 note, which was given under the agreement signed by Crawford, as security for the payment for the purchase of the 21 mining claims, and that, if Crawford was compelled to pay the note, he was entitled to a transfer of the claims. It differs from *Robinson v. Mann* in this, that the intention is clearly indicated in the agreement that he was to be an indorser, and that he was entitled to an absolute transfer of the mining claims in case he had to pay the note. He had become, in short, a party to the transaction, and had an enforceable right in case he was compelled to pay. The plaintiff was in the position, I think, to have the note expressed according to the intention of the parties: *Robinson v. Mann* (1901), 2 O.L.R. 63, at p. 65; *Harvey v. Bank of Hamilton* (1888), 16 S.C.R. 714.

I am further of opinion that, under the agreement signed by Crawford, he is estopped from denying that he is an indorser of the note, inasmuch as he has therein declared under his hand and seal that he is an indorser of the note.

The defendant set up a further defence, alleging fraud on the part of the plaintiff. I think it clear that this defence could not be sustained by the defendant in this action as an answer to the note, inasmuch as he and his associates have kept the claims so assigned, and have not offered to return them. It was, however, owing to the absence of a material witness, as it was alleged, that the defendant was not ready to proceed with his defence of fraud in this action. Leave is given him to bring an action as he may be advised against the plaintiff in respect of the original transaction.

The defendant Crawford appealed in both cases to the Court of Appeal, and the appeals were heard together by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 26th January, 1909.

J. B. Bartram, for the appellant.

J. McCurry, for the respondent.

The arguments and cases cited sufficiently appear in the judgments.

April 5. OSLER, J.A.:—If the plaintiff, as the payee of the notes, is a holder in due course within the meaning of sec. 56 of

the Bills of Exchange Act, R.S.C. 1906, ch. 119, when read with sec. 2 (g) and sec. 58 (2), the case seems to me to be within the decision of the Supreme Court in *Robinson v. Mann*, 31 S.C.R. 484, which I follow without comment or observation. That the plaintiff, though he is the immediate payee of the notes, and did not acquire them by indorsement or transfer from a party other than the maker, is a holder in due course, seems to follow from reading the interpretation section, 2 (g), into sec. 56, and reading both with sec. 58 (2). This, though not actually decided, is evidently the opinion of the Court in *Herdman v. Wheeler*, [1902] 1 K.B. 361, at p. 371, which, on the whole, I see no sufficient reason for not following.

On another ground the plaintiff is also entitled to recover. By agreement dated the 21st May, 1907, the plaintiff and others transferred to the defendant Kilpatrick a number of mining claims, recorded in the office of the Mining Recorder of the Temiskaming Mining Division, for the sum of \$8,000, payable as therein mentioned; and by another instrument of even date therewith made between the plaintiff and the defendants, it was agreed that, as security for the payments to be made as stipulated by the first, the defendant Kilpatrick, "in company with George J. Cook" (defendant), "and indorsed by J. S. Crawford" (defendant), "makes a promissory note for \$8,000, payable to the order of the said R. McDonough" (plaintiff) "two months after date, at the Bank of Ottawa at Powassan."

It was further agreed "that the said note for \$8,000 is given merely as security, and upon payment of" the money mentioned in the other agreement at the time therein specified, "the said note shall be delivered into the hands of" the defendants; and also that in the event of the said J. S. Crawford, "the indorser of the note, having to pay the same," the title to the said mining claim shall revert to him without any further payment therefor.

In *Glenie v. Bruce Smith*, [1898] 1 K.B. 263 (C.A.), the defendant agreed with the plaintiff to guarantee the payment by T. for goods sold to him by the plaintiff, and to indorse bills accepted by T. for the amount. Pursuant to the agreement, T. wrote his acceptance across the face of two stamped blank bill forms, and the defendant indorsed them. T. then handed them to the plaintiff, who filled them in for the agreed amount, making them

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payable to his order, signed them as drawer and also indorsed them. The goods were delivered to T., who was unable to pay for them. It was held that, as the defendant had agreed to be liable for the price of the goods and had indorsed the bills for that purpose, he was liable thereon.

This case, no doubt, was a decision on sec. 20 of the Imperial Bills of Exchange Act, relating to inchoate or incomplete instruments, which answers to secs. 31 and 32 of our Act, R.S.C. 1906, ch. 119, but upon the point of estoppel, arising from the fact that the notes in question were made and delivered in pursuance of the agreement and with the authority of the defendant, it appears to me clearly to shew that it is not open to the defendant to raise any defence based upon the form of the notes or the order in which the names of the parties appear thereon, or when they were placed there.

The appeal should be dismissed.

MACLAREN, J.A.:—The plaintiff, as the payee of two promissory notes for \$6,000 and \$2,000, recovered judgment against the makers, and also against the defendant Crawford, who had indorsed the notes before they had been delivered to the plaintiff. From this judgment Crawford has appealed, on the ground that his indorsing in this manner did not make him liable to the plaintiff.

The trial Judge was of opinion that the case came within the decision of *Robinson v. Mann*, 31 S.C.R. 484, which was binding upon him, and that the appellant was estopped from denying that he was an indorser of the notes sued upon, by virtue of the admissions made by him in an agreement under seal, to which the plaintiff and the defendants were parties.

It was argued before us, on behalf of the appellant, that *Robinson v. Mann* did not apply, but that the present case fell under the English and Canadian authorities which held that a party who signed a bill or note before the payee did not become liable to him, and that the payee could not become a holder in due course or claim the benefits of sec. 56 of the Imperial Act or of section 131 of the Canadian Act of 1890, inasmuch as it could not be said that the bill had been "negotiated" to him—being merely issued to him, but not negotiated.

Before the Act of 1890 such an indorsement was well known

in the Province of Quebec as an "aval," and the party so signing was liable under art. 2311 of the Civil Code, without notice of dishonour. In Ontario and the other Provinces, where a stranger to a note indorsed as warrantor for the maker, the method adopted was for the payee to indorse "without recourse" above such warrantor, who would then be liable to him and to subsequent holders or indorsees.

When sec. 56 of the bill of 1890 was under discussion in the Senate, it was decided to recognize such indorsement and to adopt the Quebec doctrine, but to treat the "aval" as an ordinary indorser, and give him notice of dishonour. In order to accomplish this there were added to sec. 56 of the Imperial Act the words, "and is subject to all the provisions of this Act respecting indorsers," making that section read: "Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers."

In *Duthie v. Essery* (1895), 22 A.R. 191, where this Court gave judgment in favour of an indorsee, who had become holder after maturity, against a stranger who had indorsed the note sued upon before the payee, Burton, J.A., described the old practice of the payee indorsing such a note "without recourse" above the signature of the warrantor as a clumsy contrivance and unnecessary.

The appellant in this case relied upon *Jenkins v. Coomber*, [1898] 2 Q.B. 168. The authority of that case is, however, much shaken by the subsequent cases of *Lloyd's Bank v. Cooke*, [1907] 1 K.B. 794, and *Glenie v. Bruce Smith*, [1908] 1 K.B. 263.

To my mind the reasoning in *Herdman v. Wheeler*, [1902] 1 K.B. at p. 372, referring to the definition of "holder" in sec. 2 (g) as including payee, in *Lloyd's Bank v. Cooke*, *supra*, at p. 806, and in *Glenie v. Bruce Smith*, *supra*, at pp. 268-9, is conclusive as to the possibility of a payee becoming a holder in due course. See also *Lilly v. Farrar* (1908), Q.R. 17 K.B. 554, where the Quebec Court of Appeal held that the payee may become a holder in due course.

But, even if there were uncertainty as to the effect of the language of the Imperial Act on the point, I consider that any ambiguity was removed from sec. 56 in the Canadian Act by the added words above quoted. In construing this section of our

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Act according to the rule laid down by Lord Herschell in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107, at p. 144, by asking, in the first instance, what is its natural meaning, uninfluenced by other considerations, it seems to me that the proper interpretation of the Act has been given by the trial Judge.

The case, however, is concluded by an authority binding upon us, *Robinson v. Mann*, 31 S.C.R. 484, which I am unable to distinguish from the present case. There it was expressly held that the indorsement which we have in this case, and which was known in French commercial law as an "aval," was a form of liability adopted by the statute into English law.

It is true that since the decision in *Robinson v. Mann* the Act has been recast, and what was formerly the first part of sec. 23 has been placed before what was formerly sec. 56, the section thus formed being now sec. 131 of R.S.C. 1906, ch. 119. The words thus prefixed are: "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such." I do not think this re-arrangement of these sections has in any way altered the law, certainly not adversely to the plaintiff.

This being the case of a note, and there being no drawer, the defendant, not having signed as maker, is subject to all the provisions of the Act respecting indorsers. Even if the plaintiff were not a holder in due course, but only a holder for value, which he is proved to have been, I am of opinion that he would be entitled to recover under our Act.

But there is more. The plaintiff is entitled also to recover on the ground of estoppel. In an agreement under his hand and seal, to which the plaintiff was a party, the defendant declared that the original note for \$8,000, of which the notes sued upon are renewals, and which was precisely in the same form, was "indorsed" by him, and that he was the "indorser" of the note.

The appeal should be dismissed.

MEREDITH, J.A.:—The facts material to the questions in issue in this case were not as well proved as they might, and should, have been; but, upon the evidence which was adduced, it is plain that the defendant Crawford had some very considerable interest in the lands which his co-defendants had been bargaining for with the plaintiff, or in the transaction by which they were acquiring

them, and, I think, upon it, that, whatever may have been his actual position in regard to his co-defendants regarding this transaction, he was to be, in it, a principal as regards the plaintiff; and, if that be so, it is immaterial whether the promissory notes in question are or are not invalid. He is liable to pay the contract price of the lands in question.

One thing is quite certain, and that is, that he was to become liable to the plaintiff for the price of the land, and was to become the owner of it if he ultimately paid the price—it was “to revert to him;” and another is that the land was conveyed by the plaintiff, under the agreement for its purchase, on the faith of that liability: the credit was given to him jointly with his co-defendants—not to his co-defendants only, payment by them being merely guaranteed by him. If this were not so, he might, and doubtless would, have been examined as a witness, and have revealed the actual facts.

But, assuming that that is not so, and that, as contended for in his behalf, he was to be a surety merely for his co-defendants, the real purchasers of the land, why should he not fulfil his contract in that respect? It is said that the Statute of Frauds prevents an enforcement of that admitted contract, because it is not evidenced in writing. That answer, however, is not in accordance with the fact. The deed of the 21st May, 1907, signed, sealed, and delivered by all the parties to this action, affords abundant evidence of an agreement by this defendant, as well as his co-defendants, to pay to the plaintiff \$8,000, the amount for which the note was given. Whether the liability of the defendant is to be secondary or primary, it is there set out in a manner ample to meet the requirement of the Statute of Frauds, as well as to prove the liability.

I would dismiss the appeal.

Moss, C.J.O., and GARROW, J.A., concurred.

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WOODBURN MILLING CO. v. GRAND TRUNK R.W. CO.

Railway—Agreement for Use of Siding—Construction—Protection of Railway from Animals—Negligence—Gate Left Open—Escape and Destruction of Animal—Implication of Terms in Contract.

A siding was constructed by the defendants from the main line of their railway to the plaintiffs' mills, which stood in a two-acre enclosure bounded on one side by the defendants' fence. At the point where the siding entered the plaintiffs' land the defendants constructed and maintained a gate across the siding and connected with the fence on each side; this gate was usually kept shut by the defendants' servants except when taking cars to or from the mills, but it was not alleged that there was any agreement that the defendants should keep it shut. The gate was left open by the defendants' servants on one occasion after they had removed a car from the siding, and the plaintiffs' horse, which was loose in the two-acre yard, escaped through the gate and was run over by a train of the defendants on the permanent way. In an action to recover damages for the loss of the horse, the jury found that the injury was caused by the negligence of the defendants' servants in leaving the gate open. A clause in the agreement between the parties concerning the use and maintenance of the siding provided that the plaintiffs should "protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company:"—

Held, that this meant that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the company; the defendants owed no duty to the plaintiffs to keep their animals away from the line of railway; the placing of the gate by the defendants, their custom of closing it, and the complaints of the plaintiffs that it was sometimes left open, could not create such a duty; and, therefore, there could be no negligence on the part of the defendants.

Per RIDDELL, J., that in the construction of the agreement it was of no significance that the clause above quoted was in the printed form of the defendants, a great part of the form having been struck out and much matter written in; also, that the practice of importing implied terms into a contract is a dangerous one; and there could be no implication here of a condition that the plaintiffs would be relieved from the agreement if the defendants left the gate open.

Judgment of the County Court of Middlesex affirmed; BRITTON, J., dissenting.

THIS action was brought in the County Court of Middlesex to recover \$200 damages for the loss of a horse owned by the plaintiffs, which was killed by a train of the defendants, owing, as the plaintiffs alleged, to the negligence of the defendants.

The action was tried before MACBETH, Co. C.J., and a jury on the 8th December, 1908. The jury found that the injury to the plaintiffs' horse was caused by the negligence of the defendants' servants in leaving open the gate across the switch line

leading to the plaintiffs' mill. The County Court Judge reserved judgment, and on the 9th January, 1909, dismissed the action, giving the following reasons:—

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In the month of August, 1907, the plaintiff company owned and operated flour mills in Glencoe. These mills stand in an enclosure of about two acres in extent, which is bounded on the south by the defendant company's fence. During the ownership of the plaintiffs' predecessors in title, a siding was constructed from the main line of the railway to the mills. The location of the siding and of the mills is shewn on the plan attached to the agreement made between the parties concerning the use and maintenance of the siding. The street shewn on the plan to the east of the mills has not been opened, and is enclosed with the plaintiffs' lands. A black mark made by a witness on the plan, at the point where the siding is shewn as entering the plaintiffs' land, indicates the position of a gate made and maintained by the defendants across the siding and connected with the railway fences on either side: this gate is usually kept shut by the defendants' servants except when taking cars to or from the mills.

On the afternoon of the 14th August, 1907, the plaintiffs loaded a car at the mill, and notified the defendants' station agent that it was ready for removal. On the same day, about 8 o'clock p.m., the plaintiffs' horse was turned loose in the two-acre field in which the mills stand, and between 9 and 10 o'clock the same evening the defendants' servants entered the siding with a locomotive and removed the loaded car: in order to do this they opened the gate on the siding. The plaintiffs' horse was in the mill-yard at 1 o'clock on the morning of the 15th August. Shortly after daylight on the same morning the plaintiffs' servant found that the gate across the siding was standing open, and that the horse had been run over by a train of the defendants on the permanent way, at some distance east of the mills. The horse was worth \$200.

The foregoing facts were admitted, or established by undisputed evidence. The jury found that the defendants' servants who took away the car from the mill on the night of the 14th August negligently left open the gate, thereby allowing the

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plaintiffs' horse to escape from that portion of the siding which is on the plaintiffs' land to the defendants' permanent way, where he was struck by a train.

The defence is rested upon clause 10 of the agreement between the parties: "10. The contractor (*i.e.*, the plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company."

This is not very well drafted, but it is part of a formal contract and clearly intended to have some meaning: full effect should be given to whatever meaning may be fairly ascribed to it.

The agreement does not make any mention of a gate, nor was any gate shewn on the plan attached thereto. And, if a gate had not been placed and maintained by the defendants, the plaintiffs would undoubtedly be bound by clause 10 to protect the defendants against the escape of animals from that portion of the siding which is on the plaintiffs' lands to the defendants' permanent way.

Then is the plaintiffs' obligation affected by the fact that a gate had been placed and was maintained on the siding by the defendants, that the defendants' servants were ordered to keep this gate shut, and that these orders were repeated when the plaintiffs complained that the gate had been left open? The gate had to be opened whenever cars were brought to or taken from the mill. And by clause 8 of the agreement the defendants have the right to use the siding "in the conduct of its business as a common carrier and carrier of passengers," and to permit other persons to use it for loading and unloading freight. The gate might, therefore, be frequently opened for any of these purposes, and on each occasion would probably remain open for a time longer than strictly necessary for entrance and exit of cars; there was also the risk that the train men might go away, leaving it open, especially when, as in the present case, they used the siding after nightfall.

The defendants consider that as against the public they are obliged by the Railway Act to keep this gate shut. If the plaintiffs neglected to keep the mill-yard enclosed, thereby permitting cattle and other animals to have access to that part of the siding

which is on the plaintiffs' land, and if, the gate being open, these animals thereby got out on the permanent way and were injured by train, the defendants would probably have to pay damages, with the right, as I think, to claim an indemnity from the plaintiffs.

In the present case, as against the plaintiffs, I think the defendants have the right to say that the plaintiffs agreed to protect the defendants against the escape of animals from that part of the siding which is on the plaintiffs' land to the defendants' lands; that the claim in the present action arises out of a breach of that agreement by the plaintiffs; and that, as against the plaintiffs, the defendants were not bound to prevent animals from entering the railway lands at the opening made in the railway fence for the construction of the siding, the obligation to do this having been assumed by the plaintiffs. I refer to *Yeates v. Grand Trunk R.W. Co.* (1907), 14 O.L.R. 63, and the cases there cited.

I think the action should be dismissed with costs.

The plaintiffs appealed from the judgment, and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 3rd March, 1909.

J. C. Elliott, for the plaintiffs. Although by the agreement an obligation is cast upon the plaintiffs, if there is negligence the plaintiffs are entitled to recover. The wording of the agreement is not sufficient to meet the claim for loss by such negligence as we have here. The defendants are not suffering from the plaintiffs' breach of duty, if any. The plaintiffs are entitled to the strictest possible construction of a document prepared by the defendants. Negligence has been found by the jury, and that is sufficient. Reference to *Owners of Cargo on Board S.S. Waikato v. New Zealand Shipping Co.*, [1899] 1 Q.B. 56, 58; Dominion Railway Act, 1903, sec. 200; MacMurchy & Denison's Railway Law, p. 319.

W. E. Foster, for the defendants. I rely on the agreement, clause 10; the defendants must fail unless the agreement saves them. The plaintiffs had no right to have an opening in the fence. The plaintiffs asked for the siding; it is there for their

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convenience, and they are to pay \$25 a year for it. Reference to *Soulsby v. City of Toronto* (1907), 15 O.L.R. 13; *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63; *Higgins v. Canadian Pacific R.W. Co.* (1908), 12 O.W.R. 1030.

Elliott, in reply. There is no evidence that the plaintiffs asked for the siding.

September 7. RIDDELL, J.:—This is an appeal from the judgment of the Judge of the County Court of Middlesex. The facts appear in his judgment.

It was argued that the contract should be taken as strongly as possible against the defendants, and, being so taken, the plaintiffs should recover upon the findings of the jury. I do not agree. While, apparently, the contract is upon the printed form of the defendants (though even that is not proved), it is apparent that the terms of the contract must have been canvassed between the parties—a great part of the printed form has been cancelled and much matter typewritten in. From the document it appears that the railway company owned the siding in question, and the plaintiffs asked the railway company to allow them to use the siding for better accommodation for shipment by rail of the products of their mill, and the railway company assented. The terms are then set out, some in typewriting and some left as in the original printed form. It is not apparent why in this case any deviation should be made from the ordinary rules for the interpretation of a contract; and the fact that sec. 10 is printed and remains as in the original form can have no significance. The section reads: “10. The contractor [*i.e.*, the plaintiffs] shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the said siding as may be outside of the lands of the company. . . .”

I do not see that it can be at all doubtful that this means that the plaintiffs will keep cattle and other animals from escaping from that part of their land occupied by the siding to the property of the company—it seems to me it does not and cannot mean only that the plaintiffs shall reimburse the company for any damage caused to their railway by (say) hogs rooting, cows scraping, and horses rolling. The meaning is “cover or shield from . . . harm, damage, trespass, etc. :” *Century Dict. ad voc.*

The object is plain—the company desired to be secured against animals coming upon their railway to the peril of their trains, their employees, and their passengers; that object could be attained only by keeping animals off the railway—this the plaintiffs agreed to do. This being the case, the company owed no duty to the plaintiffs to keep their animals away from the line of the railway, unless, indeed, the placing of the gate by the company, the custom of the railway company to have this gate closed from time to time, or the verbal complaints of the plaintiffs that the gate had been found open after being used by some of the railway company's crews, could create such a duty.

There is no pretence that the gate was placed across the opening under any agreement that the railway company should keep it shut—if one were to conjecture, it is likely that it was placed as it was by the railway company for greater caution; but no duty could arise from the placing of the gate across the opening; nor can the practice of generally, but not always, closing the gate add anything to the duty of the defendants. "The precaution taken . . . must have been wholly voluntary, and it would be much to be deplored if the defendants' liability were increased by their taking additional precautions. . . If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*, 1 Sm. L.C., 6th ed., 177." *per* Willes, J., in *Skelton v. London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631, at p. 636. This has been recently followed by my brother Britton in *Soulsby v. City of Toronto*, 15 O.L.R. 13, and is undoubted law.

The opening of the gate was necessary for the common business of the plaintiffs and defendants, and the non-closing was a neglect to perform a voluntary act.

"There is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody:" *Daniels v. Noxon* (1889), 17 A.R. 206, 211; *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685, especially at p. 694, *per* Bowen, L.J. "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who

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D. C. seeks to make him liable for his negligence:" *per* Lord Esher,
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No duty existing to close the gate which the defendants were bound to perform toward the plaintiffs, the jury should not have found negligence on the part of the defendants at all, and, indeed, the whole effect of their finding is that the gate was not closed by the railway employee.

The evidence of the conductor in which he answers the question, "Either the conductor will fasten it or see that his brakesman fastens it, that is the conductor's duty?" thus, "Yes, he has got to see the gate is closed," does not advance matters. If the answer "Yes" is intended to be to the latter part of the question ("that is the conductor's duty?") it is a mere opinion of the conductor, which is not evidence. The whole evidence makes it clear that he was talking about the usual custom. In any event the question is one of law and not of fact.

Complaint by the plaintiffs to the defendants of their neglect to do that which it was not their legal duty to do cannot raise any duty.

No duty existing on the part of the railway company toward the plaintiffs to keep any gate or fence at the point in question, and none to keep a gate closed or to close it if opened, there can be no negligence on the part of the company in respect of the plaintiffs, and so the action should fail.

With great respect for those whose views are different, it appears to me that any argument which could import here into the agreement of the plaintiffs a condition, so that they would be relieved from the agreement if the defendants left the gate open, must be equally effective in *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63, to import a similar condition relieving the plaintiff from the effect of the agreement of his landlord if the trains of the defendants were run too fast or without proper signals. Nor is there any rule forbidding any person or any company, railway or otherwise, from making a contract relieving them from the consequences of negligence on the part of their employees. The everyday example of bills of lading, insurance, etc., shew the contrary. The "unruly horse" public policy has not yet run wild to that extent.

The practice of importing implied terms into a contract is a dangerous one. So far as our Courts are concerned the Privy Council have checked the practice in *The Queen v. Demers*, [1900] A.C. 103. See *Hill v. Ingersoll and Port Burwell Gravel Road Co.* (1900), 32 O.R. 194.

“Where a contract is silent, the court or jury who are called upon to imply an obligation . . . which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent:” Cockburn, C.J., in *Churchward v. The Queen* (1865), L.R. 1 Q.B. 173, 195.

“Where the parties have made a contract which contains a variety of stipulations and is silent as to others, no stipulation or agreement which is not expressed ought to be implied, unless it is necessary to give to the transaction the effect or efficacy which both parties must have intended that it should have:” Lord Alverstone, C.J., in *Ogdens Limited v. Nelson*, [1903] 2 K.B. 287, at p. 297.

I am unable here to see that there is any necessity requiring any restriction of the agreement of the plaintiffs; and, with all respect, it seems to me that to allow the plaintiffs to recover here would be “taking a prodigious liberty with a contract:” *Johnston v. Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462, at p. 483. And it is not, in my view, at all necessary to consider what might be the rights of the parties under some different state of facts.

In my opinion, the learned County Court Judge was right, and the appeal should be dismissed with costs.

BRITTON, J.:—The plaintiffs’ claim is for the value of a horse killed upon the railway of the defendants on the 17th August, 1907, owing, as alleged, to the negligence of the defendants.

The action was tried with a jury, and the findings of fact were that the horse was killed by the negligence of the defendants’ servants, such negligence being the “leaving open the gate across the switch line leading to the plaintiffs’ mill.”

The learned Judge dismissed the action, holding that the defendants are protected against any such liability for damage to

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animals of the plaintiff by clause 10 of a special agreement entered into between the parties. The facts are fully set out in his reasons for judgment.

The clause in question is as follows: "The contractor (plaintiffs) shall protect the railway of the company from cattle and other animals escaping thereupon from such portion of the said siding as may be outside of the lands of the company, and shall at all times keep the whole of said siding clear of snow, ice, and obstructions."

Upon the argument, it was conceded by the defendants that upon the findings of fact they are liable in this action, unless protected by the agreement.

In *Yeates v. Grand Trunk R.W. Co.*, 14 O.L.R. 63, it was decided that an agreement between the railway company and the owner of adjoining land, exonerating the company from liability for damages for cattle killed or injured by the company at the crossing, was valid. Such an agreement, as between the company and the land owner, relieved the company from the statutory duty of maintaining the fence and gate. Such an agreement gave the company no right to use, for any purpose, any land of the proprietor outside of the railway land. This is an entirely different agreement from the one in the *Yeates* case.

The first thing is to determine what the agreement here really means. The words used, in their ordinary and grammatical sense, are hardly sufficient to protect the defendants in this action. The protection of the railway from any possible damage by animals is not what the railway company desired or expected to get, by this agreement. I will, however, assume that the agreement means at least that the plaintiffs were to do all that would be reasonably necessary to prevent animals from escaping from the land of the plaintiffs to the land of the defendants. That being so, the defendants would not be liable to the plaintiffs for not building or maintaining a fence separating the plaintiffs' property from that of defendants. If the defendants did nothing as to a fence, the plaintiffs could either erect one, sufficient to prevent cattle escaping, or they could keep their animals altogether off their land, or they could place a person in charge to keep animals from escaping. If the plaintiffs did erect a

fence sufficient to prevent animals from escaping, then the defendants would have no right to interfere with that fence in such a way as to render it useless as a protection to the plaintiffs' animals. There was such a fence erected by the defendants, but the plaintiffs had a right while it stood to rely upon it as sufficient protection. With it there, as a continuous fence, the animals could not escape upon the defendants' lands. Having such a fence, sufficient for the purpose, and if the animals of the plaintiffs did not escape by reason of any wilful or negligent act of the plaintiffs, the plaintiffs' agreement would be performed, and, in my opinion, there would be no liability under it to the defendants.

The recitals in the agreement aid in its construction. They are in part that the defendants construct the siding; the plaintiffs had permission to use it; the siding and all materials are the property of the defendants. Then the contract provides that the plaintiffs shall be at all the cost of maintenance and repair, and that all switches connecting the siding with the railway of the defendants shall be under the sole control of the defendants, and that the defendants have the right to use the siding for their business, as carriers. The siding could not be used either for storage or moving of cars without the connecting switches. The gate in this fence was for a necessary opening through which the cars were moved upon and from this siding. As I have said, it must be assumed upon the findings that the fence, and the gate when closed as a part of the fence, were good and sufficient to keep animals from escaping. The defendants knew this, and knew that the plaintiffs' animals were in that enclosure, or, not knowing whether there or not, and taking no trouble to inquire, owed a duty to the plaintiffs to close the gate after the cars were moved upon, or taken off from, the siding. Non-performance of that duty was negligence.

The agreement ought to receive that construction which the language will admit of, and which will best effectuate the intention of the parties, to be collected from the whole of it: *Leake on Contracts*, 5th ed., p. 146; and *Ford v. Beech* (1848), 11 Q.B. 842, 866.

It may be conceded, although not necessary to go so far, that

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the plaintiffs were, as against their own acts, or permission, and as against strangers, bound to protect the defendants from animals escaping, but the agreement does not go so far, nor was it the intention of the parties that it should go so far, as to protect the defendants against their own negligence.

It was argued that by this agreement the duty of maintaining the fence at all times was shifted from the defendants to the plaintiffs. The agreement must be taken as a whole. It provides for the user by the defendants of the plaintiffs' land. That, by the work upon the ground, was shewn to be by means of making an opening in the fence, which the plaintiffs were to maintain. The gate was provided to be opened and closed, and it is to be implied that the defendants were, in using this land, to exercise reasonable care as to opening the gate and closing it when no longer necessary for it to remain open. The defendants recognised this duty, and the conductor who was a witness at the trial said he did close the gate, but the finding of fact was, upon evidence which would warrant the finding, against the defendants. The case before us is, therefore, of an omission to close the gate, and I think that omission was negligence.

A contract relieving a railway company from the performance of a duty, even a statutory duty, may be valid, and in such a case the non-performance of what, without the contract, would be a duty, is not negligence.

In this case there was, in my opinion, the new duty created by and arising out of the right given to the defendants to use the plaintiffs' land, and the contract in this case does not go so far as to grant immunity to the defendants in case of non-performance of that duty. Speaking generally, the contract should not be so interpreted as to relieve the defendants from their own negligence.

Suppose that there was in fact no fence between the plaintiffs' land and the railway, and that the agreement was that the plaintiffs should keep their horse in the stable upon that land and not allow it to escape from the stable to the railway; and suppose that the agreement provided that the defendants could, for pay, store chattels in the stable with right of access to these chattels at all times. If the employees of the defendants in the

night time, without notice to the plaintiffs, entered the stable, finding the door securely closed, removed the chattels, and left the door open so that the horse could escape, and did escape, and did go upon the defendants' railway and did damage to the railway, would the plaintiffs be liable for such damage? I think not. If the horse was killed by the defendants under such circumstances as, apart from the agreement, would render them liable, they would not be protected by reason of such agreement.

For reasons above given, I think the appeal should be allowed and judgment entered for the plaintiffs against the defendants for \$200 with costs of the action, and the defendants should pay the costs of the appeal.

FALCONBRIDGE, C.J.:—I find myself constrained to agree with the opinions of the learned Judge appealed from and of my brother Riddell.

It is unfortunate, in view of the able dissenting judgment of my brother Britton, that the case can go no further.

The appeal is dismissed with costs.

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REX V. MILLER (No. 2).

June 10.

Habeas Corpus—Prisoner Confined under Conviction for Offence against Provincial Act—Procedure—Powers of Provincial Legislature—Jurisdiction of Divisional Court—Application for Second Writ—Res Judicata.

The procedure applicable to a motion for a writ of *habeas corpus*, where there has been a committal for an infraction of a provincial Act (in this case the Liquor License Act) is such as may be prescribed by the provincial Legislature.

A Divisional Court of the High Court of Justice has no power to hear a motion for a writ of *habeas corpus* unless a Judge has directed that it be made returnable before a Divisional Court, or unless the parties consent to a Divisional Court entertaining the motion: Judicature Act, R.S.O. 1897, ch. 51, sec. 67; R.S.O. 1897, ch. 83, sec. 8; Con. Rule 117; and, even if the Court in this case had jurisdiction to grant a motion made to it for the issue of a second writ, the matter was *res judicata* by the judgment of the Court on a motion to discharge the defendant upon the first writ: *ante*, 125.

Taylor v. Scott (1899), 30 O.R. 475, followed.

MOTION by the defendant to a Divisional Court for a writ of *habeas corpus*, in the circumstances stated in the judgment.

On the 4th June, 1909, the motion was heard by a Divisional Court consisting of MULLOCK, C.J.Ex.D., MAGEE and CLUTE, JJ.

J. B. Mackenzie, for the defendant.

The Crown was not represented.

June 10. MULLOCK, C.J.:—This is a motion by Frank Miller, at present said to be confined in the county gaol under a conviction for an infraction of the Liquor License Act, for a writ of *habeas corpus*. On the 24th March last, writs of *habeas corpus* and *certiorari* in aid were issued, and an application for the prisoner's discharge was made to Mr. Justice Latchford, and refused. From such refusal the prisoner appealed to the King's Bench Division, which dismissed the appeal (*ante*, 125). Thereupon the prisoner made the present motion before the Exchequer Division. Two formidable difficulties are in the way of this motion, and I am unable to find any satisfactory answer to either of them. One is that this Division has no jurisdiction to grant

the motion; the other, that if it has jurisdiction, the matter is *res judicata*.

In considering these two points, it is to be observed that the procedure applicable to the motion for *habeas corpus*, where there has been a committal, as here, for an infraction of a provincial Act, is such as may be prescribed by the provincial Legislature. Mr. Mackenzie argued that the prisoner's offence must be regarded as a crime, and that, therefore, the practice applicable to the administration of criminal justice arising out of Dominion legislation must govern in the present case. I am not, however, able to adopt that view. By sub-sec. 15 of sec. 92 of the British North America Act, provincial legislatures enjoy exclusive legislative jurisdiction in respect of "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section;" and the Liquor License Act is a law made in relation to one of those subjects.

This Act being within the jurisdiction of the Ontario Legislature, the powers necessary to carry out its objects are also within that jurisdiction: *Russell v. The Queen* (1882), 7 App. Cas. 829. The offence of which the prisoner was found guilty is a quasi-criminal offence, but made such only by provincial legislation, and the procedure in regard thereto comes within the exclusive legislative authority of the provincial Legislature. Various authorities establishing this view will be found collected in the clear and able judgment of Mr. Justice MacMahon in *Regina v. Bittle* (1892), 21 O.R. 605.

Turning then to provincial legislation, R.S.O. 1897, ch. 83, sec. 8, enacts as follows: "The Judges authorized under the Judicature Act to make Rules may, from time to time, and as often as occasion requires, make such Rules of practice in reference to the proceedings on writs of *habeas corpus* as may seem necessary or expedient." And the Judicature Act, R.S.O. 1897, ch. 51, sec. 67, enacts as follows: "Subject to Rules of Court, the following proceedings and matters shall be heard and determined before a Divisional Court of the High Court: . . . (b) cases of *habeas corpus* in which the Judge directs that a motion

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for a writ, or the writ, be made returnable before a Divisional Court."

Under the authority of these two Acts, Con. Rule 117 was passed, which declares that "the following proceedings and matters shall be heard and determined before the Divisional Courts. . . . Cases of *habeas corpus*, in which a Judge directs that a motion for the writ, or the writ, be made returnable before a Divisional Court."

The Divisional Court is a creature of provincial legislation, and has only such powers in respect to matters under provincial jurisdiction as the provincial Legislature has conferred upon it. The extent of that jurisdiction is to be found in the legislation of the Province and the Rules authorized by such legislation. The only jurisdiction of the Divisional Court to deal with an application for a writ of *habeas corpus*, in a case like the present one, is such as is provided for in Rule 117, namely, to hear an application for *habeas corpus* where the Judge has directed that the motion for the writ be made returnable before a Divisional Court, or where (which is not the case here) parties consent to the Divisional Court entertaining the motion. There has been no direction by a Judge making this motion returnable before a Divisional Court, and, therefore, we have no power to hear it.

As to the next point—that the matter is *res judicata*—this Court, I think, is concluded by the case of *Taylor v. Scott* (1899), 30 O.R. 475. In delivering judgment Armour, C.J., said (p. 482), referring to *Re Boucher* (1879), 4 A.R. 191: "The effect of that decision I take to be that a person confined or restrained of his liberty is limited to one *habeas corpus* only, to be granted by any Judge of the High Court returnable before himself or before the Judge in Chambers for the time being, or before a Divisional Court, and from the judgment given upon the return of this *habeas corpus* remanding him, he is entitled to appeal to the Court of Appeal, and the judgment of that Court is conclusive upon all inferior tribunals."

So far as appears, the facts of this case at the time of the granting of the writ of *habeas corpus* and to-day are the same; and, therefore, on the authority of *Taylor v. Scott*, *supra*, the case made on this motion is *res judicata*, and the prisoner is not entitled to a new writ.

For these reasons, his application fails, and it is unnecessary to deal with the merits. Nevertheless, I have given them some consideration, and if they required to be dealt with, I should probably reach the result come to by the King's Bench Division.

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MAGEE, J.:—I agree in the result.

CLUTE, J., concurred.

G. G.

[IN THE COURT OF APPEAL.]

LAMONT V. CANADIAN TRANSFER CO. LIMITED.

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Carriers—Lost Luggage—Contract of Carriage—Receipt—Condition Limiting Liability—Notice—Agents of Owner—Alteration of Oral Contract—Negligence—Damages.

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The defendants were an incorporated company, a main part of whose business was to carry and deliver baggage or luggage for customers, to and from railways, steamboats, and other public conveyances. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the Customs, handed the check to H., also a Customs officer, and asked him to pass the trunk and have it sent up to the house. H. gave D., the defendants' agent on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned in about fifteen minutes after he had left the check and the money with D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it—he knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the check to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the articles for which the receipt was given, subject to a condition that they should "not be liable for any loss or damage of any trunk . . . for over \$50." The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen; but without negligence on the part of the defendants. The defendants tendered to the plaintiff \$50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action:—

Held, MEREDITH, J.A., dissenting, that the plaintiff was entitled to recover the full value of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care, in the absence of notice, brought

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home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract.

Harris v. Great Western R.W. Co. (1876), 1 Q.B.D. 515, *Henderson v. Stevenson* (1875), L.R. 2 H.L. Sc. 470, and other cases bearing on the liability of carriers for loss or damage to luggage discussed.

Per MEREDITH, J.A., that the question whether the plaintiff had accepted the condition limiting the defendants' liability was one of fact, and the finding of the trial Judge in favour of the defendants should not be reversed unless plainly shewn to be wrong on the evidence.

Judgment of a Divisional Court, reversing the judgment of BOYD C., at the trial, affirmed.

THIS was an appeal by the defendants from the judgment of a Divisional Court reversing the judgment of BOYD, C., at the trial dismissing the action with costs.

The action was brought by the plaintiff to recover the value of a trunk carried by the defendants for hire, and lost or mislaid. The facts are fully stated in the judgments.

The action was tried at Toronto on the 10th April, 1908, before BOYD, C., without a jury.

R. S. Robertson and R. F. Segsworth, for the plaintiff.

B. N. Davis, for the defendants.

April 11, 1908. BOYD, C.:—The claims of the plaintiff to recover are put on three grounds: (1) that the defendants undertook for hire to receive and transfer his trunk to its proper destination (53 Robert street, Toronto), without conditions; (2) that, if there was any condition that in the event of loss they were not to be liable beyond the extent of \$50, it was not made known to the plaintiff till after the loss, and so he is not affected by it; (3) that the evidence shews that the defendants were negligent and are chargeable as for the conversion of the trunk.

The defendants are, no doubt, in the position of common carriers, and they have become incorporated under the general Dominion statute for the purpose of carrying on a baggage transfer company. The practical operations are carried on by a body of soliciting agents who take the baggage checks from passengers, receive the fixed fee charged, and give a voucher or receipt, which uniformly has on its face a notice legibly

printed of the terms on which the transfer is undertaken. It is thus expressed (so far as material in this case): "The Canadian Transfer Company agrees to receive and forward the articles for which a receipt is given, subject to the following conditions, viz., this company will not be liable for any loss or damage of any trunk . . . for over \$50."

The law is that a common carrier who gives no notice limiting his liability is an insurer of the property received; but, if he gives notice, which is brought home to the customer, that he will be liable only to a limited extent, he ceases to be an insurer beyond that limit.

Here the general system of the company was to take the baggage with restricted liability; and no proof was given that the minor agents who did the work of receiving and receipting had authority to receive baggage on any other footing, so as to bind the company to a larger responsibility. See what is said on this by Blackburn, J., in *Harris v. Great Western R.W. Co.* (1876), 1 Q.B.D. 515, at pp. 533-4.

What happened was that the plaintiff's steamer check was given to his father-in-law, who was in the Customs; he passed it to Horn, a friend, also in the Customs, who gave it to Dunn, the defendants' agent in charge of the baggage room on the wharf, and paid him twenty-five cents. Dunn took the money and checked the baggage with the defendants' check, taking off the steamer check. Dunn handed the money to Saunders, the soliciting agent of the defendants, who forthwith made out a receipt for it on the usual form. In about fifteen minutes afterwards, Horn came back and got the receipt, which he says he looked at, but did not read. He knew the company gave receipts, and it was a common thing for passengers to leave their checks with the landing-waiters (such as Horn) to be attended to. Horn must have been familiar with the *modus operandi* of the company and the nature of the receipt; this, I think, would be a proper inference from all the evidence. Horn gave the receipt to the plaintiff's father-in-law about 10.30 a.m., and it is not further traced, and the father-in-law was not examined.

It appears that the trunk with the defendants' check was taken over to the distributing point of the company—a baggage

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room in the Union Station—and was put in the north-west run of trunks, which were kept separate, and were to be distributed at 11 a.m. It does not appear to have been sent out at that time on that run, and has not been seen or heard of since—though all manner of inquiries, investigations, and advertisements have been made use of by the company; it is lost, and there is no evidence of any lack of reasonable care or precaution on the part of the company. The disappearance seems to be an unaccountable accident, and not traceable to any negligence that would render the company liable for a conversion.

I do not think that the plaintiff can escape from the effect of knowledge of the restricting notice by the plea that Horn was not his agent to receive notice, or not his agent to enter into a conditional contract. Horn was acting as the *alter ego* of the owner, and notice to him affected the owner, unless there was prompt repudiation of the receipt—which has not yet happened.

There is no evidence of any unconditional contract by the company—everything points the other way; there was no completion of the matter when the twenty-five cents was paid and the transfer of checks made; there was yet to be given the receipt and notice which completed the contract on the part of the company, and the receipt of it by Horn a quarter of an hour afterwards was a continuation and completion of the whole bargain as to the carriers' undertaking.

The contract was plainly spread on the fact of the receipt, which Horn took and looked at and kept and handed over to the father-in-law, and which forms the basis of the plaintiff's action. It would be most dangerous to hold that the agent or the principal taking such a receipt in such a manner is not to be bound by it because he fails to read it. The company, in the discharge of their business, can do no more; plain notice in legible print is given on the face of the receipt; and their right to be protected by it cannot turn upon the possibility that the careless customer or his careless agent may omit to read it: *Parker v. South Eastern R.W. Co.* (1877), 2 C.P.D. 416; *Acton v. Castle Mail Packets Co. Limited* (1895), 1 Com. R. 135.

I see no escape from the conclusion that the action fails and

should be dismissed with costs. The company tendered \$50, which was refused; this may be applied in reduction of the costs.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was heard before FALCONBRIDGE, C.J.K.B., MACMAHON and RIDDELL, JJ., on the 15th and 16th June, 1908.

R. S. Robertson, for the plaintiff.

B. N. Davis, for the defendants.

October 31, 1908. FALCONBRIDGE, C.J.:—This case has been most ably discussed by both my learned brothers.

James Dunn was in charge of the baggage-room for the defendants on the 22nd June. Riddy, the father-in-law of the plaintiff requested a brother officer of H. M. Customs, one Horn, to get the trunk in question sent up to his (Riddy's) place, giving him at the same time the steamer check and twenty-five cents to pay the charges for delivering it.

Horn gave the check to Dunn and told him it was from one of the men in the Customs House. Dunn offered to "O.K." it for him, *i.e.*, to send it up without charge. Horn refused, saying Riddy had given him twenty-five cents to pay for it, gave Dunn the money, and walked away.

Probably fifteen minutes after, Horn came back and asked for a receipt, and was given the paper containing the notice which the defendants rely on as limiting their liability to \$50. Horn says he did not read it; he gave it to Riddy about an hour and a half later.

However, before Horn returned and asked for the receipt, Dunn had "stripped" the trunk, *i.e.*, taken the steamer check off it. This act completed the final and absolute taking possession of it by the defendants. A contract binding on the defendants had then been entered into prior to the giving of the receipt. The defendants in thus accepting the plaintiff's trunk for carriage and delivery assumed the risks and liability of a common carrier, and the act of Dunn in handing Horn, who asked only for a receipt, a paper purporting to alter a contract already made, without at least calling special attention to it, cannot effect such alterations.

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In my opinion the appeal ought to be allowed and judgment entered for the plaintiff for \$487.35 with costs here and below.

MACMAHON, J.:—The check received by the plaintiff from the Richelieu and Ontario Navigation Company for his trunk and given to Mr. Riddy, his father-in-law, was by him handed to Mr. Horn, a Customs landing waiter at the Yonge street wharf (where the baggage is landed from the steamer and where the defendants have a store-room) with instructions to have the trunk re-checked by the defendant company to be delivered at Mr. Riddy's residence in Robert street.

After Horn had performed his duty as an officer of the Customs, in examining the contents of the trunk and passing it, he would, for the purpose of having the trunk re-checked, be the plaintiff's agent, and when, after handing the twenty-five cents to Dunn, the defendants' agent, he returned to procure a receipt, it was as if the plaintiff had gone himself and demanded it; and he is in no better position than if he had personally obtained the receipt, which is as follows:

“THE CANADIAN TRANSFER COMPANY LIMITED
TORONTO, CANADA.

Nos. of R.R. checks.

Where going.

47975

53 Robert St.

To insure the prompt delivery of baggage passengers should see that their address and check numbers are put down correctly on this receipt, which must be returned to the driver on delivery of baggage.

Passengers should see that the exact amount paid for baggage is marked on this ticket.

Charges:

25 Pd.

The Canadian Transfer Company (Limited)

Agrees to receive and forward the articles for which a receipt is given subject to the following conditions, viz:

This company will not be liable for any loss or damage of any trunk, valise, or package, or thing, for over \$50.00, nor upon any property or thing unless properly packed and secured for transportation, nor for any fabrics consisting of or contained in glass.

Nor shall this company be liable for loss or damage unless the claim thereof shall be made in writing within thirty days from the accruing of the cause of action."

When the receipt was given, and not until then, was the contract completed, and Mr. Horn understood that a receipt should be obtained by him from the transfer company, shewing that the money had been paid, and that the trunk was to be delivered at the address given in Robert street. The conditions are plainly printed on the receipt, and any person accepting it who was not illiterate would at once recognize that conditions were attached to the receipt.

In the case of *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, Richard Harris, who deposited the plaintiff's luggage with the company, obtained a receipt which on its face contained the place of deposit, viz., "Luggage and Cloak Office," a description of the articles deposited, and the amount paid by the owner for each article, which was signed by the receiving clerk, and was "subject to the conditions on the other side." The conditions on the other side were lengthy. Richard Harris said his attention was not called to the conditions, although he believed there were some conditions. The railway servants put cloak room labels on the packages and left them without any other protection in the vestibule to which passengers had access. They were stolen by a thief, who was afterwards convicted, but only part of the property was recovered. It was not disputed that the loss was occasioned in consequence of the defendants' servants having failed to exercise proper care in and about the safe-keeping of the luggage thus left with them. Mr. Justice Blackburn had no difficulty in reconciling his judgment in that case with the judgment of the House of Lords in *Henderson v. Stevenson* (1875), L.R. 2 H.L. Sc. 470. He said (pp. 529, 530): "I call attention to this matter particularly, because I not only think myself bound to obey the decision of

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the House of Lords in *Henderson v. Stevenson*, but I also think (if I rightly understand the judgment) that, though that decision goes a step further than any prior decision of which I am aware, it is a logical extension of a principle which had been previously recognized by the Courts; and therefore I do not only obey that decision but acquiesce in it. But there are expressions used by the different Lords which seem to express opinions which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket, on the production of which the goods will be given up to the person producing it. On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments, mentioned by Lord Holt in *Coggs v. Bernard* (1703), 2 Ld. Raymond 909, 1 Sm. L. Cas., 11th ed., p. 173, the bailee (unless he is one who has the responsibilities of a public carrier or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury; the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken. But if the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that

writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms."

In *Henderson v. Stevenson* there were on the face of the ticket the letters indicating the name of the steamboat company, and the words "Dublin to Whitehaven," but there was no reference on the face of the ticket to the conditions printed on the back, and the passenger had not read and was unaware of them. Lord Cairns, referring to that, said: "The present is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained, without reference to anything *dehors*."

Mr. Justice Blackburn then proceeded to refer to the case he had in hand, and said (p. 532): "But, in the present case, the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who reads that reference could, without difficulty, look at the back and see what these conditions were; and, that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking that ticket, never looked at the face of the ticket or bestowed a thought on what the conditions were; in other words, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted."

When the case of *Parker v. South Eastern R.W. Co.*, 2 C.P.D. 416, reached the Court of Appeal, Bramwell, L.J., at p. 426, said: "It is clear that if the plaintiffs in these actions had read the conditions on the tickets and not objected they would have been bound by them. No point was or could be made that the contract was complete before the ticket was given." And he

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pithily asks, at p. 427: "Why is there printing on the paper, except that it may be read? The putting it into their hands was equivalent to saying, 'Read that.' Could the defendants practically do more than they did? Had they not a right to suppose either that the plaintiffs knew the conditions, or that they were content to take on trust whatever is printed?"

See also *Watkins v. Rymill* (1883), 10 Q.B.D. 178; *Zunz v. South Eastern R.W. Co.* (1869), L.R. 4 Q.B. 539, at p. 542; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611.

The contract between the plaintiff and the defendants was complete when Horn demanded and received the receipt and not before. The conditions are printed on the face in good sized type, and are contained in ten or twelve lines which can be read in thirty seconds.

I consider the case in hand is governed by *Harris v. Great Western R.W. Co.*, and that the judgment of the Chancellor is therefore right.

The appeal, I think, should be dismissed with costs.

RIDDELL, J.:—The defendants are a transfer company, who, we are informed, have, by agreement with the railway and steamboat companies bringing passengers into Toronto, the sole and exclusive right of going upon trains and steamboats and soliciting custom for their business, which is mainly, at least, the transferring of baggage from the station or wharf to residences or hotels. The plaintiff entrusted a trunk to this company at the Yonge street wharf for transfer to 53 Robert street, and paid for such transfer. The trunk was lost while in the care of the defendant company, and, although the trunk contained wearing apparel, furs, etc., of the value of nearly \$500, the defendants contend that they should pay only \$50; and that because, shortly after they had received the trunk and the steamer check for it, and had been paid for the transfer, upon being asked for a receipt, the document they handed to the person who had paid contained printed terms which relieved them from paying more. I venture to think that if the law supports them in this claim it is time for Parliament to interfere and prevent a monopoly of facilities for soliciting such business upon the public conveyances being allowed to a company in-

sisting upon such a claim. It is said that the "receipt" should have been read by the person receiving it and by the owner of the trunk—who would think of reading a receipt given in this way? And who would suppose a receipt would be or could be intended to be a special contract?

If, however, it be the law that the defendants can escape ninety per cent. of liability in this way, it cannot be too widely known—so that travellers may be on their guard.

The facts are that the plaintiff on his wedding journey arrived on the Richelieu and Ontario Navigation Co. boat from Clayton on the morning of the 22nd June, 1907, a Saturday morning; he and his wife were to go to the house of her father, Mr. Riddy, 53 Robert street; they handed the steamer check for the trunk in question to Mr. Riddy to have the trunk sent up to 53 Robert street. Mr. Riddy is an employee in the Customs department, and he saw Mr. Horn, the landing waiter on the Yonge street wharf, and handed him the check and asked Horn if he could pass the trunk and have it sent up to his place. Horn took the check and also the coin—twenty-five cents—which Riddy had given him, and went over and saw Mr. Dunn, the agent of the defendants on the wharf, told Dunn that Mr. Riddy would like to get this trunk up as soon as possible, that Mr. Riddy was one of the men in the Customs house. Dunn offered to send the trunk up to the address given gratis; but Horn said, "No, Mr. Riddy gave me twenty-five cents to pay for it, and you might as well take the money." Horn then gave Dunn the money—he had already given him the check—and went away. There was no talk of any special contract, or of any contract, and had nothing more taken place it is hard to see that there was anything but a plain and simple contract to deliver the trunk, for the consideration which had been paid.

The defendant company have a contract with the Richelieu and Ontario Navigation Co. whereby they take possession of all the baggage coming in on the boats—naturally this will assist them in securing a great part of the transfer work.

Dunn upon receiving the "quarter" turned around and gave it to Saunders, the soliciting clerk, and himself proceeded to "strip" the trunk, *i.e.*, to take the steamboat check off it.

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Of course, he had no right to do this, unless he was in possession of the trunk for his company. Horn had walked away as soon as he had paid over the money to Dunn. About fifteen minutes after, he came back and said, "You'd better give me a receipt for that trunk, so I can shew I paid that twenty-five cents, because I don't want him (Riddy) to think I didn't pay for it." Dunn's story is a little different. He says that Horn came back for a receipt and said something might happen that trunk. He does not, however, dispute the lapse of time alleged by Horn, and the differences in the two stories are, to my mind, immaterial. What was asked for was a receipt for the trunk, and there was no question or suggestion of any contract or special term, or of anything to modify or affect the arrangement already made. Then it was that Saunders wrote out the receipt and handed it to Horn. From a casual reading of Saunders's evidence it would seem as though he were saying that he made out and gave the receipt immediately upon receiving the money, but this is not so: see the evidence of Horn and Dunn; and that the receipt was made out after the "stripping" of the trunk, and therefore after the payment of the money, appears from the evidence of Thompson.

Horn's attention was not called to any terms upon the "receipt;" he did not read it, merely looked at it, and didn't see any writing on it; he knew that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About one hour and a half thereafter, Horn handed the check to Riddy, who passed it on to the plaintiff, who did not read it until about ten days afterwards.

The trunk was taken by the defendants from the Yonge street wharf to the Union Station, there placed in a "wide open depot," as the defendants' agent calls it, placed amongst the trunks for delivery in the north-west part of the city for the 11 o'clock delivery; and, so far as the defendants or their servants called at the trial will say, it is never seen again. On Saturday evening the defendants, on being telephoned to, said that the trunk would be sent up early on Sunday morning; inquiry on Sunday did not produce the trunk; on Monday the plaintiff went away to Buffalo on the 7 a.m. train, his wife went with him

to the station and saw Mr. Penny, who was taking Mr. Thompson's place at the time. She asked Penny if they had found the trunk, and he answered no. On Wednesday she again went down and saw both Penny and Thompson, the superintendent of the defendants at the Union Station, who said that the trunk could not have gone out on any train and it must have been sent to the wrong address; that he was hunting for it. The defendants advertised for it four times in all the evening papers, suggesting that it had been delivered to the wrong number—to the wrong person. Thompson says that he did not say to Mrs. Lamont positively that it had been delivered to a wrong address, but that is as far as he will go.

The defendants advance no theory as to the manner in which the trunk disappeared. Counsel upon the argument was invited to suggest any theory for the mystery except that of wrong delivery, but failed to do so.

The learned trial Judge has given effect to the contention of the defendants, *ante* p. 294, and the plaintiff now appeals.

The judgment appealed from is based upon three cases: *Parker v. South Eastern R.W. Co.*, 2 C.P.D. 416; *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515; *Acton v. Castle Mail Packets Co. Limited*, 1 Com. R. 135. The last is also (and better) reported in 73 L.T. 158 and 8 Asp. M.C. 73, and will be considered later. The other two are cases of deposit of goods in a cloak room at the station of a railway.

In the case in 1 Q.B.D. the Court distinguished *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470, the case of a common carrier, from the case then under consideration—the “case of a person depositing goods with a company who were in no way bound to receive them, and contemporaneously receiving a ticket, which he knew was to be given up when the goods were demanded back.” This the plaintiff in that case did not know; see p. 533.

In the case in 2 C.P.D. the Lords Justices disagreed, but the majority of the Court, Mellish and Baggallay, L.JJ., held that there could be no obligation on the plaintiff to read the condition upon the receipt, and that the jury should be asked whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition. In that case not only was the

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condition printed upon the ticket, but a placard with the same information legibly printed was hung up in the cloak room.

The *Acton* case was a trial before Lord Russell in 1895. The plaintiff bought a ticket from Durban to London: on the margin and in bold print were the words, "Issued subject to the further conditions printed upon the back hereof," and on the face of the ticket itself was printed matter which the plaintiff saw, but did not read; on the face was the clause, "The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances," and on the back, in italics, the provision that the company would not be liable for luggage unless the passenger paid at a certain rate. The Lord Chief Justice, who tried the case without a jury, first decided that under the statutes, certain of the lost luggage could not be recovered for—the judgment then proceeds to consider whether the conditions on the ticket were the terms and conditions of the contract of passage of the plaintiff, and holds (8 Asp. M.C. at p. 75) that "the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage-money was received from him, and upon which the defendants were willing to enter into a contract to carry him . . . The plaintiff . . . must have known, and at least ought to have known, that when he was engaging a passage in such circumstances as these, there would necessarily be conditions regulating the circumstances under and upon which he was to be carried. He candidly says that he did see that there was written and printed matter upon the face of the document, but that he did not read it; that there was a printed notice of a cautionary kind in the same sense put up in his cabin, but that he did not read it until after the loss." The Lord Chief Justice, after saying that "in all cases of contracts of passage of this nature documents are delivered which are not mere documents of receipt, but are documents which do contain conditions," adds, "I therefore come to the conclusion that the plaintiff, candidly admitting that he saw that there was not merely writing but printing upon the face of the document, ought to have assumed, and I think he must have known that it probably did contain conditions upon which he was about to be carried . . ."

These cases do not seem to me to conclude the present, for reasons which will appear later. Before discussing the effect of these and other cases which were cited before us, it will not be amiss to consider the general law.

The defendants are a transfer company, and it is well established—indeed it is admitted and is found by the Chancellor—that they are common carriers. “Transfer companies pursuing the business of transferring baggage or freight to and from railroad or steamboat depots, or between different parts of towns or cities, are common carriers and subject to liability as such:” 6 Am. & Eng. Encyc. of Law, 2nd ed., p. 253; cf. vol. 3, p. 581. We asked for the charter of the company, which is said to be a Dominion corporation, and we are by the defendants handed their provincial license as shewing their charter powers. The charter of the company, as appears from the provincial license produced, authorizes the company “(a) to collect, receive, transfer, convey and forward baggage, luggage, goods, wares, produce, merchandise and all articles of commerce and other effects, and to carry and convey passengers to and from any places in Ontario; (b) to warehouse and store (including cold storage) any of the said articles so transferred or received for transfer by the company, and (c) to acquire, etc., etc. . . . use and operate such vehicles as may be requisite or incidental to the carrying on of the company’s business.”

It will be seen that the company have powers of a very wide character; it is proved that they as a fact do sometimes transfer goods which are not baggage. See the evidence of Harper, p. 26: “render services in the transportation of freight and baggage to whomsoever wants it transported and for hire;” and specific instances are given. See also p. 28. No denial is attempted of the specific instances given, nor indeed of the general statement; the manager contenting himself with saying that the “waggons are all baggage waggons,” and that they “have no freight waggons.” It is established that the defendants are and hold themselves out as common carriers of goods—at the very least of the particular kind of goods, personal baggage. Such being their status, it is their “duty . . . to receive and carry the goods of any person offering to pay his hire,” except under circum-

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stances which do not arise here: Macnamara's Law of Carriers, 2nd ed., art. 22; their responsibility is "fixed by the acceptance of the goods:" *ib.*, art. 38; that responsibility continues "until they reach the final destination to which they are addressed," "in the absence of special limitation of liability:" *ib.*, art. 39; and, in the absence of special limitation, are "liable by the custom of the realm, in case of loss of or injury to the goods, unless the loss or injury arises from—(1) the act of God; (2) the King's enemies; (3) contributory negligence on the part of the bailor; (4) an inherent vice in or natural deterioration of the thing carried:" *ib.*, art. 45. They may limit their common law liability by receiving the goods subject to certain conditions, or in any other manner making a special contract with the consignor: *ib.*, art. 83. The existence of a special contract must be proved by the defendants if a special contract be alleged, otherwise the defendants are insurers. The single question here is, "Has a special contract been proved by the defendants?" And the answer to that depends upon whether the "receipt," delivered as it was, is a special contract.

The two cases first cited do not assist—they are cases of companies receiving goods which they were under no obligation to receive—not as common carriers at all. The duties and responsibilities of bailees of that kind are markedly different from those of common carriers, and in the *Harris* case this is pointed out very clearly by Blackburn, J., at p. 533. After discussing the case of *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470, to which reference will be made later, he says: "The defendants, as a railway company, are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general, but any one wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris (the plaintiff) did in fact know this."

The *Parker* case is still further from being an authority in

favour of the defendants, as the Court of Appeal held that, even in the case of such a bailment as is under consideration, the plaintiff must either know of the limiting condition, or the defendants must have done that which was reasonably sufficient to give him notice of the same.

The *Acton* case presents more difficulty, but full effect may be given to it without damage to the plaintiff's case. It may well be that, granting that the defendants would otherwise be common carriers in respect of the plaintiff's luggage, any reasonable person engaging a passage of such length as from Durban to London "must have supposed that in a contract of passage of this kind accompanied by baggage and by luggage it is absolutely necessary that there be conditions regulating the conduct of the passenger, and giving to those representing the ship-owner certain powers of control, without which it would be impossible to preserve discipline and order and ensure the safety of passengers and of their property on board ships; and, therefore, it cannot reasonably be supposed that any person taking a ticket for a passage of this kind could be under the notion that the whole contract between them was embraced in his paying passage money and merely getting a receipt for the same. A person taking a ticket under such circumstances must have understood, and must be taken to have understood, that there would be necessarily incident to such a relation as he was contemplating entering upon, certain conditions regulating the nature and character and obligations relatively of that agreement." Granting all that is said, there is an obvious distinction between hiring a passage on a ship from South Africa to England with baggage and luggage, and getting a trunk transferred from the wharf at Toronto to a private house in that city. The latter is procured every day by handing a railway check and twenty-five cents to a carter. There are no regulations, etc., etc., necessary.

Watkins v. Rymill, 10 Q.B.D. 178, was relied upon by the defendants. That was the case of a special bailment—the defendant was keeper of a repository for the sale on commission of carriages, etc. The plaintiff delivered him a waggonette to be sold, and took from him a printed form which contained a receipt followed by the words, "subject to the conditions as ex-

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hibited upon the premises.” One of these conditions gave power to the defendants to sell goods remaining over one month on their premises. The plaintiff did not read the ticket, and it was held that he was conclusively bound by the condition.

The case is distinguished from *Henderson v. Stevenson* (there is a misprint on p. 183, the report reading, “the circumstances of the present case have ‘an’ (instead of ‘no’) analogy to those of *Henderson v. Stevenson*”). The *ratio decidendi* is much like that in the *Acton* case—see p. 183: “The circumstances of the contract were such that any man of ordinary intelligence must have known that special terms as to its execution must in the nature of things be made.” And even thus, this case has been blown upon in our own Supreme Court in the *Robertson* case in 24 S.C.R. 611—see pp. 617, 618.

The *Zunz* case in 1869, L.R. 4 Q.B. 539, was decided upon what it was supposed was the effect of the authorities binding upon that Court—see at p. 544: “We are bound on the authorities to hold, that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and must be bound by them.” If that was the state of the authorities in 1869, it is, I think, clear that such is not the case now.

Costello v. Grand Trunk R.W. Co. (1906), 7 O.W.R. 846, was a case in which the plaintiff had signed a special contract for shipment; and he was held bound by it. So, too, *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611. *Coombs v. The Queen* (1896), 26 S.C.R. 13, simply decides that when a person buys a railway ticket the contract is for a continuous journey, and he cannot insist upon going part of the way at one time and part at another. It is true that an additional reason was by the Court given why the plaintiff could not succeed, *i.e.*, he had a plain warning on the ticket itself.

None of these cases does and none of them can overrule the decision of the House of Lords in *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470. There the plaintiff had taken from the defendants a ticket from Dublin to Whitehaven; on the face of the ticket were the words “Dublin to Whitehaven” and letters indicating the name of the defendants; on the back a special provision as to liability, which the plaintiff

did not read. The case is one in the Scottish Courts, but the law of England and the law of Scotland are the same so far as this case is concerned (*Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, at p. 528, *per* Blackburn, J.). The Lord Chancellor, Lord Cairns, agrees "entirely with the observation of the Lord Ordinary in the present case, where he says in his note: 'It has not been shewn that the Pursuer's attention was called either to the bills in the office or to the notice on the back of the ticket, or that he knew either of the one or of the other. There is no reason to doubt the Pursuer's word when he says he never read the conditions on the back of the ticket. Now it seems fixed that, in a case like this, mere notice not brought home to and assented to by the Pursuer is not enough.'" And the Lord Chancellor adds: "Can it be held that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, he ought to inform himself upon them? My Lords, it appears to me impossible that that can be held." Lord Chelmsford, after discussing the duty of the defendants as common carriers, says at p. 477: "I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger. . . . The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid," etc.

Lord Hatherley, at p. 478, says: "Now he entered into a contract as a passenger for the conveyance of himself and his luggage from Dublin to Whitehaven. In the absence of any restriction, assented to by him, to his right, he was entitled to consider himself as assured of that passage . . . They delivered to him a ticket, he having, in the first place, paid his money for the passage from Dublin to Whitehaven. I agree . . . that the money having been paid, and the ticket having been

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taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary."

Lord O'Hagan, at p. 481, says: "When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted. . . ."

This case was followed in *Bate v. Canadian Pacific R.W. Co.* (1889), in the Supreme Court, 18 S.C.R. 697, reversing the decision of the Court of Appeal, 15 A.R. 388.

In *Richardson v. Rowntree*, [1894] A.C. 217, a ticket was bought from Philadelphia to Liverpool. The ticket contained a number of conditions which the plaintiff did not read. The jury found that the plaintiff knew that there was writing or printing on the ticket, that she did not know that such writing or printing contained conditions relating to the terms of the contract of carriage, and that the defendants did not do what was reasonably sufficient to give her notice of the conditions. Upon these answers it was held that the plaintiff was not bound by the conditions. The facts were "that the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. . . . Nothing was said to draw her attention to the fact that the ticket contained any conditions." Lord Watson, in concurring, added: "It appears to me that there was ample material for a finding by the jury on all these three issues, and I am at present inclined to think that they found rightly upon them all."

From the authorities it seems clear that even in the case of a ticket being handed to an intending customer of a common carrier, which contains conditions limiting the liability of the carrier, the conditions do not become by that fact alone binding upon the customer. The very highest at which the rights of the carrier can be put is that if the customer has (a) read the conditions, or (b) knows that the ticket contains conditions and

abstains from reading them, or (c) if the circumstances are such that he must be held to know that the ticket contains conditions, as, *e.g.*, if the carrier has done all that is reasonably necessary to give the customer notice that the ticket contains conditions, or the journey is of such a character that any reasonable man would know that there must be conditions—then the carrier may avail himself of the conditions.

I do not think that the defendants have succeeded in this case in proving the least they must prove. (a) Horn did not read the receipt; did not see any writing on it; looked at it in the same way he would look at a paper he was handed; he had seen the defendants give receipts over and over again. (b) Nor is there a tittle of evidence that Horn knew that the paper contained conditions. (c) The receipt was not handed to him at the time he paid; it apparently would never have been handed to him at all if he had not bethought himself that he was acting for another and asked for a receipt for the trunk. The paper was handed to him in response to his request for a receipt for the trunk, and not at all as a special contract or as containing the terms upon which the trunk would be accepted for transfer and the money for payment—the trunk was already in the possession of the defendants for transfer, and they had taken off the steamer check and the money had been paid a quarter of an hour before. There were no circumstances which would induce a reasonable man, then at least, to think that the receipt contained special conditions (at least not if I am a reasonable man—I am sure I have handed my checks to the servants of this company and received receipts a dozen times without having any thought that the paper I received contained conditions). There was absolutely nothing done by the defendants to draw Horn's attention to the special conditions, or to the fact that there were special conditions or any conditions.

Then it is argued that the agents of the defendants had no authority to enter into any but the contract evidenced by the "receipt;" and *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, and the remarks of Blackburn, J., at pp. 533-4, are referred to. However the case may be where the master is other than a common carrier—and it were useless to enter upon a discussion of

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the general principle—it seems clear that such a company as this are bound by a contract of the agent whom they put forward as having the management of that part of their business: *Pickford v. Grand Junction R.W. Co.* (1844), 12 M. & W. 766; *Heald v. Carey* (1852), 11 C.B. 977; *Winkfield v. Packington* (1827), 2 C. & P. 599.

I have said nothing about negligence; but it is hard to see how the conduct of these defendants is consistent with care. No theory is advanced for the disappearance of the trunk, and it does not seem to be a prudent system which permits the sudden vanishing of such an article.

Upon the whole I am of the opinion that the judgment entered by the Chancellor in the trial Court for the defendants should be set aside and judgment entered for the plaintiff for the amount proved, viz., \$487.35, and that the defendants should pay the costs, including the costs of this appeal.

I would repeat that I think it would be an unfortunate thing if the result were different—and, if the result should be different, the fact cannot be too well known—travellers should know that those soliciting baggage to be transferred do not intend and cannot be made to pay for it, if it disappears while in their custody.

The defendants appealed to the Court of Appeal, and the appeal was argued on the 26th and 27th January, 1909, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

G. H. Watson, K.C., and *B. N. Davis*, for the defendants, contended that the evidence shewed that, as stated in the judgment of the trial Judge, the general course of the defendants' business was to take the baggage with restricted liability, and they relied on the condition contained in the contract made by them with the plaintiff, by which it was stipulated that they should not be liable for any loss or damage to the trunk for over \$50, and the defendants' servants had no authority to make any other contract. The plaintiff was bound by the acts of his agent, Horn, who is found by the trial Judge to have been familiar with the defendants' mode of transacting business, and the nature of the receipt given by them. The trial Judge also finds that there is no evidence of any unconditional contract by

the defendant company, and on these findings the law is clearly in their favour. The defendants rely on the reasonings set forth in the judgments of the Chancellor, and of MacMahon, J., and on the authorities cited therein.

R. S. Robertson, for the respondent, argued that on the evidence the whole matter was at an end so far as Horn's agency was concerned, when he paid the fee and handed over the check for the trunk, and the defendants cannot escape liability through his subsequent act in returning for the receipt, which was done on his own account, and not as agent for the plaintiff. The authorities relied on by the plaintiff are set out and discussed in the judgment of Riddell, J.

Watson, in reply.

May 5. Moss, C.J.O.:—The defendants appeal from the judgment of a Divisional Court reversing, by a majority, the judgment of the trial Judge, who dismissed the action, and awarding the plaintiff judgment for the value of a trunk and its contents carried by the defendants for hire and lost by them.

There is nothing in the pleadings or otherwise to prevent an examination of the actual facts as proved at the trial, or the ascertainment of the position of the parties towards each other as appearing in the evidence.

The terms of the defendants' charter of incorporation, as well as the testimony given on their behalf, shew that the defendants are common carriers. They are exercising a public employment and undertake to carry and deliver (among other things) baggage or luggage for customers to and from railways, steamboats, and other public conveyances.

And of this opinion was the learned trial Judge, who said (*ante*, p. 292): "The defendants are, no doubt, in the position of common carriers, and they have become incorporated under the general Dominion statute for the purpose of carrying on a baggage transfer company."

Further on (*ante*, p. 293) the learned trial Judge stated the law applicable to persons in the position of common carriers as follows: "The law is that a common carrier who gives no notice limiting his liability is an insurer of the property received; but,

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if he gives notice, which is brought home to the customer, that he will be liable only to a limited extent, he ceases to be an insurer beyond that limit."

The onus is on the carrier to prove that he has brought home to the customer notice limiting the liability.

The defendants admit the receipt by them of the trunk and its loss, but do not seek to escape from all liability. They set up notice to the plaintiff of a stipulation or condition limiting their liability to \$50.

And the question is, whether they have proved that there was incorporated in the contract between the plaintiff and them a stipulation, express or properly implied, the effect of which was to limit the defendants' liability. The answer depends on whether the defendants have brought home to the plaintiff notice of the condition printed on the "receipt" for his trunk, which the plaintiff has in his possession. The condition limits the defendants' liability to \$50, but ought the plaintiff to be held to be aware of and to have accepted the condition as a part of the contract for the carriage and delivery of his trunk?

It may be assumed that, if the defendants had been able to prove that at the time of the delivery of the trunk to the defendants and the payment of the twenty-five cents charge for its carriage to and delivery at 53 Robert street, the "receipt" had been given to and received by the plaintiff's father-in-law, or by Horn, both of whom acted for him in transferring the trunk to the defendants' custody, it would not have been necessary for them to have gone further in the way of affecting the plaintiff with notice of the condition.

But that was not this case. The "receipt" was not delivered contemporaneously with the assumption by the defendants of the custody of the trunk and the receipt of the charge for carriage and delivery. That being the case, the defendants were not entitled to rely upon the mere after-taking of the receipt as sufficient. They were called upon, under the circumstances, to shew either that they took other steps beyond mere delivery of the receipt to draw attention to its special nature, or that, in some reasonable way, knowledge of the condition was brought home to the plaintiff, who accepted it as a term of the contract.

Actual knowledge of the existence of the condition cannot, upon the evidence, be imputed to the plaintiff, his wife, or any of those concerned in his behalf, nor is there any good reason for inferring that any one of them supposed or believed that the defendants' course of doing business for the travelling public was subject to any special condition respecting the liability of the defendants in case of loss or damage to the property they undertook to carry.

The utmost that appears is that Horn knew that the defendants were in the habit of usually giving receipts, but he was not aware of their form or contents.

The defendants have failed to shew a special contract taking them, as respects liability for loss, out of the ordinary rule, and the appeal fails.

GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court, varying the judgment at the trial before the Chancellor, who found in favour of the plaintiff, but limited the damages to \$50, which were increased by the Divisional Court, MacMahon, J., dissenting, to \$487.35.

The defendants do not dispute their liability up to the \$50, but contend that by a condition contained in the receipt their liability is limited to that sum, as was held by the learned Chancellor.

The condition is printed on the face of the document and is not at all ambiguous or difficult to understand. And if it had been handed to Mr. Horn when he paid over the twenty-five cents as the price of the cartage, the conclusion would be irresistible that he, on behalf of the plaintiff, had accepted the special contract. And this would probably be so whether in fact he had, or had not, read or become aware of the contents of the receipt. His duty would be to read a document so constructed and so presented, as evidencing the terms on which the defendants proposed to undertake what was required of them.

But what difficulty there is, is, I think, created by the special circumstances, which require careful attention. Horn did not in fact read the receipt. Nor did the plaintiff until about ten days after the event, when about to make a claim. Horn, who

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is a Customs officer, knew that it was customary for the defendants to give receipts, but he was not asked, nor did he say that he had any knowledge of the usual contents of such receipts. He was merely acting in the matter for Mr. Riddy, the plaintiff's father-in-law, who had handed the check and the cartage money to him to deliver to the defendants in order to have the trunk forwarded to the plaintiff's address in Robert street. There was nothing in the circumstances to suggest to him anything in the nature of a limited or special contract of any kind. At first the defendants' agent, Dunn, was apparently willing to send the trunk without charge, "O.K.'d" as it was called, probably because of Horn's position in the Customs, although the reason is not stated, I think, but Horn said it was for Mr. Riddy and that he had left twenty-five cents to pay for the cartage. He then paid Dunn the money and give him the check, and at once went away without having been offered a receipt, and the transaction seemed for the time closed.

Had the matter thus remained, the defendants' unlimited liability would have been beyond doubt. Their agent had accepted the bailment and had been paid the price agreed upon. Under the circumstances, the doubt, for after all it is only a doubt, expressed by Blackburn, J., in *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515, at p. 533, quoted with approval by the learned Chancellor, can have no application.

But Horn after an absence of about fifteen minutes returned and demanded a receipt, and was then handed the document now in question. By that time the defendants had taken possession of the trunk, and had had it "stripped," that is, had taken off the regular check and attached their own ticket of transfer. What would have been the consequence if Horn had then read the document, or been informed of its contents, need not be considered. If he had read it and disapproved of the condition, he might doubtless have reclaimed the trunk, or if having read it he had expressed no disapproval, it might well be the proper inference that he accepted it as expressing the true contract, by which the plaintiff as his principal would be bound. But he did not read it or otherwise become aware of its contents. And the real question is, ought knowledge to be imputed to him under the circumstances?

This is a pure question of fact, and, in my opinion, the reasonable inference is the other way. He had already made an unconditional contract after having been offered free cartage. He came back, not to get a new or different contract, but a mere receipt. That was what he asked for, and he might under the circumstances fairly and without negligence assume without reading it that he was merely getting what he had asked for and nothing more. If he had not come back no question could have been raised as to the defendants' liability, and the burden is of course upon them to shew that the new contract was substituted, with the plaintiff's consent, for the old, and in this they, in my opinion, fail.

Efforts have been made from time to time to have similar inferences regarded as inferences of law, and not of fact, but the current of authority is, I think, otherwise. As an instance see *Watkins v. Rymill*, 10 Q.B.D. 178, but that case in *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611, at p. 617, is considered to be in conflict with *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470, and the more recent case of *Richardson v. Rowntree*, [1894] A.C. 217. See also *Bate v. Canadian Pacific R.W. Co.*, 18 S.C.R. 697, as explained in the *Robertson* case at the page before referred to (617); *Parker v. South Eastern R.W. Co.*, 1 C.P.D. 618, and in appeal, 2 C.P.D. 416.

In *Henderson v. Stevenson* the condition was wholly printed on the back of the ticket. In *Parker v. South Eastern R.W. Co.*, on the face of the receipt there were the words "see back," and on the back was the condition.

But, so far as appears, the condition in *Richardson, Spence & Co., etc., v. Rowntree* was written or printed on the face of the ticket, but the ticket itself was so folded as that no writing or print appeared without opening it. So that it is, I think, fair to say that the result of the cases is to shew that the determining factor is not, whether the condition is on the back or upon the face of the contract, but whether, from all the circumstances of the case as disclosed in the evidence, the plaintiff knew or ought to be assumed to have known of the limiting conditions. In the *Richardson* case the questions submitted to the jury and approved in the House of Lords

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were: (1) Did the plaintiff know that there was writing or printing on the ticket? This was answered in the affirmative. (2) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage? This was answered in the negative. (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? This was also answered in the negative.

And in this case, if similar questions had been submitted to me as a jurymen, I would, upon the evidence and without hesitation, have answered them in the same way.

The appeal, in my opinion, fails, and should be dismissed with costs.

OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—There has already been an exceptional diversity of judicial opinion in this case, for which, however, it may not be difficult to account. We have all, more or less, a personal interest in the subject matter of the litigation. We have all more or less frequently occupied the position of the plaintiff as a contractor with the defendants for the carriage by them of our luggage, and though perhaps none of us has been as unfortunate as he was in having had his luggage altogether lost, I for one feel bound to plead guilty of having, more than once, experienced a loss of temper over delays in the delivering of luggage which, perhaps in haste and without a full knowledge of all the circumstances or a due consideration of them, seemed exasperatingly needless. Unconscious personal interest is very apt to misguide any one.

The trial Judge found all the material facts in favour of the defendants, and dismissed the action; one of the Judges of the Divisional Court approved of such findings and conclusion; another of them found in favour of the plaintiff upon the narrow ground that the writing in question had no effect because it was not delivered until a short time—some fifteen minutes—after the time when, as he found, a contract had been made; whilst the third of such Judges was feelingly in favour of the plaintiff all along the line.

The question involved being one of fact—whether a question for Judge or jury is at the moment not material—and of a fact to be found more from the acts than from the words of the parties, affords another reason for such diversity of opinion; whilst a third arises from the lack of exact uniformity in the decisions, and in the expressions of opinion, in the authorities, which are well collected and commented upon in the case of *Watkins v. Rymill*, 10 Q.B.D. 178, by the late Mr. Justice Stephen.

I am quite unable to accept the narrower view of the case, given effect to, as I have said, by one of the Judges of the Divisional Court. It seems to me impossible to sever completely the giving and acceptance of the writing from the transaction, and to treat it as having no sort of effect upon the contract. The writing was asked for and was given as evidence of the defendants' responsibility, that is, of their contract. It is idle to say that it was asked for and given merely to shew that the man entrusted with the making of the contract had given the sum of money needed for that purpose, had not misappropriated it to his own use. It was given to and accepted by him as that which would also place the proper responsibility upon the proper shoulders if there should be any miscarriage; for that purpose it was retained and soon afterwards handed on to the intermediate agent, and by him eventually to the principal, and for the like purpose was retained by him, and from that time on used by him in his demands upon the defendants for the delivery of the luggage, or compensation for its loss, as his evidence of their responsibility for it; and indeed is thus stated in the statement of claim in this action: "4. Afterwards the said Customs House officer delivered the said baggage check and trunk to the defendants and received from them a receipt check No. 47975, for which the charges, 25c., were duly paid to the defendants or their agent; . . . 7. The plaintiff never authorized the said Customs House officer to enter into any agreement with conditions as set forth in the said receipt of the defendants, and never assented to any such contract being entered into on his behalf": not that such an agreement was in fact never made. Besides all this, before action brought, a claim of \$800 for

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the loss of the luggage was made by the plaintiff's Chicago attorney-at-law, upon this receipt; and a subsequent claim for \$500 by his Toronto solicitors, in the like manner. It is not unimportant that the intermediary was the plaintiff's father-in-law, to whose house the luggage was to be sent, and with whom the plaintiff and his wife were to stay, for when the document came to his hands it was substantially at home. This somewhat—if I may use the expression—slim ground of defence was therefore an afterthought, arising apparently for the first time in the Divisional Court.

Upon the broad question, what was the actual contract between the parties, we must start at the beginning. We must have regard to the actual position of each of the parties in regard to such a transaction at the time it took place. It will not do to jump to the conclusion that the defendants were common carriers, and that the plaintiff's intention was to deal with them as such without any sort of limitation to their common law liability as such carriers.

I assume, however, that the defendants were common carriers, and that, in the absence of a special agreement limiting their liability, they would be answerable in damages to the plaintiff in the full amount of his claim; but, at the same time, it is clear upon the evidence that it was their invariable rule that their liability upon contracts, for the carriage of such luggage as that in question for the charge of twenty-five cents, should be limited to fifty dollars; and that none of their servants or agents had any actual authority to enter into such a contract except with such limitation of liability.

On the other hand, the plaintiff was a resident of Chicago, and a man who travelled a good deal, and one who could not but be aware of the common, if not universal, practice of limiting liability on contracts for the carriage of luggage. He was just returning from a long journey in which his luggage must have been "checked" many times, and he must generally have been in the habit of having luggage "checked," and, being a business man, he could hardly have helped observing upon his "checks" such limitations of liability. It is hardly likely that any "check" or receipt ever obtained by him did not contain such a limitation.

The "check" of the navigation company, which was handed to the defendants when the contract in question was made, doubtless contained such a limitation. Why then should the plaintiff expect or intend to enter into an unlimited contract with the defendants? My finding, upon the whole circumstances of the case, would, in that respect, be, that the plaintiff expected and intended to enter into the usual contract, and not to enter into an exceptional one giving him greater rights than those which the public generally acquired in like contracts for the like services at the like price. He nowhere even suggests that he knew anything about common carriers or their common law liability, or that he intended to enter into any sort of a contract different from those which he was in the habit of making for the carriage of his luggage, or different from that provided for in the navigation company's "check" which he was about to exchange, in effect, for one of the defendants'.

Then his agent, having no instructions to the contrary, proceeded to make the contract in the usual manner, and at his request received the usual evidence in writing of that contract. Having asked for it, as I have before mentioned, as evidence of the defendants' responsibility, and having received it as such, why should not its terms be binding, it being in fact the usual form of contract and the only one which the persons, who made the contract in the defendants' behalf, had any power from the defendants to make? Having asked for the evidence, and having had it prepared and handed to him, the defendants are hardly blameable if he did not choose to read it. They, in effect, said to him, these are the terms of our responsibility; and they were plainly printed in a few words on the face of the document. It was not the case of a ticket issued in a hurry, where there was no reasonable opportunity of reading it because of the urgency of others to purchase their tickets, or of a bad light, or bad print, or inability to read. The man had it in his possession for fifteen minutes with abundant opportunity for fully digesting all its contents. Had he read it, what would have been the result? Probably nothing, for he would have seen that it was in the usual form, the same as every one else got; whilst, if he had objected or enquired, the result would have been the same, he would have been in-

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formed that it was the usual receipt and the only receipt they could give. Then the receipt was handed on to the plaintiff's father-in-law and taken by him as the proof of the defendants' responsibility, and used as such by him and his daughter, the plaintiff's wife, and by the plaintiff, yet none of them at any time repudiated it until this action was brought, and then only on the ground that the man who made the contract had no authority to make such a contract for the plaintiff; a contention which is not founded in fact, for the agent's power was not limited, and, indeed, it was, as I have said, the intention of the plaintiff that the usual contract should be made. If, in no sense misled by the carrier, the owner of the luggage could abstain from reading the evidence of the contract which the carrier intended to enter into—such contract being a reasonable and usual one—placed in his hands as evidence of the contract, and thereby get the benefit of a contract the carrier did not intend to enter into, and would not for the same money have entered into, an injustice would be done. It would also be unjust if the careful man would be bound because he was reasonable enough to read the document, whilst the careless man would be accorded higher rights because he was unreasonable enough not to read it.

There is no difficulty in finding, as I do, that, had the man who received it read the document, or had the plaintiff, his wife, or his father-in-law, first received it and at once read it, no objection would have been made, each would have known, or seen, that it contained only a usual, if not reasonable, condition limiting liability, and would have accepted it without demur, just as their habit had been to receive "checks" of a like character; and that, even if objection had been made, there would eventually have been acquiescence rather than incur the additional expenses of some other means of taking their luggage home with them. It is quite plain that the defendants would not have contracted for unlimited liability, and I think it equally clear that the plaintiff would not have adopted the alternative of paying a cabman double or more than double the price of the carriage of the luggage. To prove this it does not need the fact that neither the plaintiff nor his solicitors, after not only reading but carefully studying the plaintiff's position with a view to making a claim against the de-

defendants, objected in any way to the form of the writing, but with that fact it seems to me to be undeniable that no objection would have been made if the document had been read by any or all of the persons mentioned at the time it was obtained, or, at the least, that it would ultimately have been accepted.

We are not directly concerned with any question of the reasonableness or unreasonableness of the condition in question; but indirectly it may bear upon the questions of fact involved in the case; it may more or less affect the probabilities; and therefore it may be proper to say that there is, in my opinion, nothing unreasonable in the defendants fairly limiting their liability for luggage carried and delivered in any part of the city of Toronto for twenty-five cents each large piece. It may be that the limitation ought to be \$100 and not \$50, for it is not improbable that the average value of the contents of all the luggage carried by the defendants would not very greatly exceed \$100 in each piece; and, where luggage of exceptional value is given into their charge, the very plainest of fair play requires that they should be made aware of the fact, and be paid an additional sum for its carriage, if they are to be also insurers of it. On the other hand, it was, as it seems to me, very unreasonable of the plaintiff to have given the luggage in question into the defendants' charge without making them aware of the fact that it contained clothing of exceptional value, and such as it is most unusual to carry about at the season of the year when the transaction in question took place—mink furs in the end of June—unless the plaintiff expected them to be carried at his own risk.

It is not necessary for me to consider whether the condition in question covers loss arising from the defendants' negligence; because the trial Judge has found that loss through negligence has not been proved, and I am unable to say that his finding in that, or indeed in any, respect was wrong. One of the learned Judges has asked, what could the cause of the loss be if it were not negligence? But that is not a difficult question. One obvious answer is, theft, against which even the most careful of us are sometimes unable to guard. If the plaintiff, or his wife, had happened in any way to disclose the fact that the not very large piece of luggage in question contained valuable furs, and that its

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contents were worth “\$800,” or even “at least \$500,” in the hearing of any clever thief, from whose presence neither the docks of Toronto nor the navigation company’s vessels have complete immunity, it is by no means an extraordinary thing that the luggage vanished and that no honest man can tell whither it went.

It therefore seems to me, that, for these reasons, the judgment at the trial should not have been disturbed and should now be restored: (1) Upon a question of fact, the true finding of which was much more difficult in the Divisional Court than at the trial, the trial Judge found in favour of the defendants, and that finding ought not to have been reversed unless plainly shewn to be wrong; that has not been done. Some of the recent cases upon the subject of a court of appeal disturbing findings of fact at a trial are set out in the recent case of *Re Blye and Downey*—not reported—and need not be repeated here. The advantages of a trial Judge, in more ways even than in the very important matter of seeing and hearing the witnesses, are constantly referred to and are very obvious, whilst the disadvantages of a court of appeal, in having before it only that which has been gracefully described as the dead body of the evidence, and which might often as truly, though inelegantly, be described as its mutilated remains, ought to be equally obvious, and must be unless one is quite too self-confident; (2) If the case had to be determined upon such evidence, without the aid of anything determined at the trial, my finding would be, that the plaintiff accepted the condition limiting the amount of the defendants’ liability; And (3) the judgment pronounced at the trial is quite in accord with the later cases and the present trend of judicial opinion, and in no way in conflict with anything that was decided by the House of Lords in the Scotch case of *Henderson v. Stevenson*, L.R. 2 H.L. Sc. 470.

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[IN THE COURT OF APPEAL.]

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Master and Servant—Injury to and Death of Servant—Workmen's Compensation for Injuries Act—Notice Prescribed by sec. 9—Reasonable Excuse for Failure to Give—Administrator—Right to Give Notice before Issue of Letters—Ignorance of Law—Negligence—Workman Run over by Train in Railway Yard—Findings of Jury—Licensee—Statutory Duty—Defective System—New Trial—Ground not Alleged in Pleading.

Section 9 of the Workmen's Compensation for Injuries Act, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in the case of death the want of notice shall not bar the action which the Act gives, if the Judge is of opinion that there was "reasonable excuse" for the want of notice:—

Held, that ignorance of the law is not a "reasonable excuse;" and in this case the plaintiff, the brother of the deceased person who was injured, might have given the notice before he was appointed administrator, and his solicitor's mistaken idea to the contrary did not excuse the want of the notice; and the action therefore failed.

Judgment of a Divisional Court reversed.

The deceased was employed by the defendants as a workman on the tracks in a railway yard, and, when crossing the tracks with other workmen on his way home from work, was struck by an engine and killed. The negligence alleged was that the engineer in charge of another engine in the yard let off a large quantity of steam, which prevented the deceased from seeing or hearing the engine which struck him. The jury found that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; and that there was no contributory negligence. On these findings the trial Judge entered judgment for the plaintiff:—

Held, by the Divisional Court, that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Dominion Railway Act, because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, within the meaning of clause 1 of sec. 3, from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend.

The Court of Appeal, reversing the judgment upon the other ground, did not, as a Court, express an opinion upon these points.

But, *semble*, *per* OSLER, J.A., referring to *Willets v. Watt & Co.*, [1892] 2 Q.B. 92, that the discretion of the Court below in allowing the plaintiff to make a new case, after the time had elapsed within which a new action could be brought, should not, on that ground, be interfered with.

Semble, *per* GARROW, J.A., that the true position of the deceased at the time of the accident was not that of a mere licensee, but of a person upon the defendants' premises by their invitation, and one to whom the

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defendants owed a duty to take reasonable care that he should not be injured.

And, *semble*, per MEREDITH, J.A., that there was no proof of any negligence on the part of the defendants; and the granting of a new trial in order to enable the plaintiff to set up an entirely new case was contrary to proper practice.

APPEAL by the defendants and cross-appeal by the plaintiff against an order of a Divisional Court granting a new trial, on appeal by the defendants from the judgment at the trial in favour of the plaintiff in an action by him, as administrator, to recover damages caused by the death of his brother Michele Giovinazzo, which was said to have been caused by the negligence of the defendants.

The action was tried before CLUTE, J., and a jury, at Toronto, on the 24th and 25th September, 1908, and, after certain questions had been answered by the jury, the trial Judge delivered judgment in favour of the plaintiff for \$600 and costs.

From this judgment the defendants appealed to a Divisional Court, and the appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 23rd November, 1908.

I. F. Hellmuth, K.C., for the defendants.

H. L. Dunn, for the plaintiff.

December 23, 1908. The judgment of the Court was pronounced by MEREDITH, C.J.:—The action is brought by the respondent as administrator of the personal estate of Michele Giovinazzo, deceased, to recover damages for the killing of the intestate, who was an employee of the appellants, owing to their negligence.

The acts of negligence complained of as set out in the statement of claim are in substance that on the 18th September, 1907, the deceased was employed by the appellants as a workman on the tracks of their railway in their yard at Toronto Junction; that when the deceased was proceeding home from his work across the tracks of the yard, a locomotive came along one of the tracks, and, just as the deceased and his companions crossed the track in front of the locomotive, the engineer in charge of it caused it to let off with a loud, hissing noise, a large quantity of steam; that this steam “formed a dense cloud and

completely enveloped the deceased and prevented him from hearing locomotives or cars approaching on other tracks near him, and from seeing in what direction he should go to avoid being struck;" and that while he was in this situation another locomotive "came along, moving backwards in the same direction on another track," close to the other track, and knocked the deceased down and so injured him that he died on the following day.

The specific negligence charged is:—

1. That no person was stationed on the tender of the locomotive which struck the deceased to give warning of its approach, and that no signal of its approach was given by bell, whistle, or otherwise.

2. That the engineer in charge of the other locomotive improperly and unnecessarily caused it to let off the steam just as the deceased and his companions crossed the track in front of the locomotive.

The claim is made both under the Workmen's Compensation for Injuries Act and the common law.

The appellants in their statement of defence, besides denying the allegations of the statement of claim, plead the want of the notice prescribed by sec. 9 of the Act.

Neither in the statement of claim, nor by any subsequent pleading, does the respondent set up any ground for excusing the failure to give the statutory notice.

The action is brought on behalf of the father and mother of the deceased, both of whom reside in Italy, and the respondent is a brother of the deceased.

Upon the argument two objections which, as contended, were fatal to the respondent recovering, were relied on:—

1. That no actionable negligence was proved.

2. That there was nothing shewn to dispense with the necessity of the statutory notice.

Dealing first with the second of these objections, the facts are that the deceased had no relative in America but the respondent, who at the time of the accident was working on a railway near Kenora; that, having heard of the death of his deceased brother, he wrote to the Italian consul for the purpose

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of ascertaining if the report of the death was true, and received word from him on the 7th November that it was true; that the respondent then waited for his pay, which was delayed, and when it was received proceeded to Toronto, arriving there on the 5th December; that he there, on the following day, saw the consul for the purpose of learning the particulars of his brother's death, and the name of a lawyer to whom he should go; that, having received the desired information, and on the same day, he consulted Mr. Dunn, of the legal firm who are his solicitors in the action, and instructed him to ask the appellants for a settlement, and left the case in his hands; that after learning of his brother's death, the respondent wrote to Italy, presumably to his father or mother, and, as he says, got instructions from them to bring an action on the 8th November, four or five days after he set out for Toronto; that the solicitor advised him that letters of administration must be taken out; that there was some delay in arranging for the giving of the administration bond, but that the papers were executed on the 19th December and filed in the Surrogate Court on the 21st December, and the grant of the letters of administration was made on the 30th of that month; that on the 13th January following, the solicitors obtained a copy of the proceedings at the inquest which had been held upon the body of the deceased; that conferences with the consul and an interpreter followed throughout January, and that on the 26th February notice of the accident was given to the appellants.

Mr. Dunn accounted for the delay in giving the notice, or some of it, by saying that he was under the impression that until the letters of administration were obtained the notice could not be given.

During the course of the argument at the trial, when this objection was raised, the counsel for the appellants, after my brother Clute had observed in answer to an argument of his, "but he took prompt action in getting letters, he gave bondsmen," replied: "I do not want to press this matter unduly against a fellow practitioner."

My brother Clute eventually ruled that there was reasonable excuse for the want of notice.

Section 9, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in the case of death the want of the notice shall not bar the action which the Act gives, if the Judge is of opinion that there was reasonable excuse for the want of notice.

The twelve weeks expired on the 12th December (the accident having happened on the 19th and not on the 18th September, as stated in the pleadings).

The position of matters on the 12th December was that the necessary documents for obtaining letters of administration had not been completed, owing, however, to no neglect or delay on the part of the respondent or of his solicitor, both of whom were then apparently not informed of the circumstances under which the accident had happened, though the appellants must have been aware of them from the first, as an inquest was held.

Any delay after the 12th December is not, in my opinion, to be considered. The notice, to be effective, must be given within the twelve weeks, and the only question for the trial Judge was whether there was a reasonable excuse for not giving it within that period.

That the decision of the trial Judge is open to review upon appeal is settled; and it is also settled by decisions binding upon us, that neither ignorance of the necessity of giving the notice, nor the knowledge by the company of the accident, standing alone, is a reasonable excuse for not giving the notice, within the meaning of sec. 9. Both or either of these may, we think, be regarded as elements of the excuse, but "something more is required, whether personal to the individual injured or to the employer, or to both:" *per* Osler, J.A., in *O'Connor v. City of Hamilton* (1905), 10 O.L.R. 529, at p. 536; and, as was said by the same learned Judge in *Armstrong v. Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560, at p. 568, "What may constitute reasonable excuse for not giving notice is not defined, and must depend very much upon the circumstances of the particular case."

The circumstances of this case, as I have detailed them, are peculiar, and in our opinion warranted the learned trial Judge

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in holding that there was reasonable excuse for not giving the notice. The deceased was a foreigner, having no relation in America but the respondent, who, having no pecuniary interest in the continuance of his life, had no right of action against the appellants; he was also a foreigner, and was working many hundred miles from the place at which the deceased was killed; he had no knowledge of the circumstances under which the death had happened, and did not even know that the report of his brother's death was true until the 7th November. The father and mother, who were the only persons having a right of action, resided in Italy; with them the respondent promptly communicated as soon as he learned that his brother was dead, and did not obtain authority to act for them until four or five days after he left Kenora for Toronto. The date when he left Kenora is not stated, but he reached Toronto on the 5th December, and immediately put himself in communication with the Italian consul there; being advised by him to do so, he on the following day saw a solicitor and gave instructions to him to obtain letters of administration of his brother's estate; there was no unreasonable delay in obtaining the letters of administration, and they were granted on the 30th December. Up to this time the circumstances under which the death occurred were apparently not known to the respondent, for on the 13th January his solicitor obtained a copy of the proceedings at the inquest, presumably in order to possess himself of that knowledge; and, in addition to all this, the solicitor was of opinion that until the respondent was clothed with administration of the deceased's estate he could not give the requisite notice.

It may be that as the delegate of his father and mother, he might have given the notice, but he could not have given it in any other capacity until the grant of the letters of administration had been made.

As I have said, these circumstances were, in our opinion, sufficient to warrant the ruling of the trial Judge, or, at all events, we cannot, having regard to them, say his ruling was wrong.

It is further to be observed that the counsel for the appellants, at the trial, if he did not actually give up the objection based

on the want of notice, at least indicated to the trial Judge that if his opinion was against his contention, he would acquiesce in that opinion.

There is more difficulty in dealing with the other objection, in view of the findings of the jury that the negligence with which they found the appellants were chargeable was "blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks," and also because "a proper outlook was not kept in a proper place on both engines when backing," and of the fact that there is no finding of any fact from which an inference can be drawn that the defendants owed any duty to the deceased that steam or hot water would not be blown off where that was done, or to keep the look-out which they find was not kept.

The respondent's case can not, we think, be supported under the provisions of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, the provisions of which are that "where personal injury is caused to a workman . . . 5. By reason of the negligence of any person in the service of the employer who has the charge or control of any points signal, locomotive, engine, machine, or train upon a railway, tramway or street railway; the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

The effect of this legislation being, therefore, to give the workman and his legal personal representatives the same right in respect of the acts of negligence mentioned in clause 5 as they would have had if the workman had not been a workman of or not in the service of the employer nor engaged in his work, it becomes necessary to consider what would have been their rights if the deceased had not occupied that relation to the appellants.

It appears to us that the position of the deceased, in view of the provisions of clause 5, and the absence of any finding that he occupied any other position, was that of a mere licensee to

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whom the defendants owed no duty to use care to protect him, and who had no right to complain of an injury happening to him owing to the way in which they carried on their business on their own premises: *Beven on Negligence*, 3rd ed., p. 442, note 3.

The same observations apply to the other negligence found by the jury, the statutory duty imposed upon railway companies by sec. 276 of the *Railway Act* (Dominion) with respect to trains or cars moving reversely having no application except where they are passing over or along a highway at rail level.

There was, however, an aspect of the case developed in the evidence, but not stated in the pleadings or dealt with by the jury, which may entitle the respondent to recover.

There was evidence that the deceased and other workmen in the employment of the appellants, in large numbers, were in the habit of crossing the railway tracks, in the way in which the deceased crossed, in going to and returning from their work, and there was some evidence that this course was taken not only with the knowledge but by the direction of the appellants.

If this were found by the jury to be the fact, we do not see why the appellants are not liable to answer for the injury done to the deceased, upon the ground that the system which they had in use at the place of the accident was a defective one within the meaning of clause 1 of sec. 3, and one which exposed their workmen to unnecessary danger.

As this aspect of the case was not dealt with by the jury, or indeed presented at the trial, the verdict and judgment cannot be allowed to stand, but it would be unfair that the action should be dismissed on that account, as that would leave the respondent without any remedy, because the time within which an action must be brought has now elapsed.

Under all the circumstances, therefore, the order to be made is that the appeal be allowed, the judgment pronounced at the trial reversed, and a new trial directed, and that the costs of the last trial and of the appeal be costs in the cause unless otherwise ordered by the Judge before whom the action shall be retried, and that the respondent should have leave to amend his statement of claim as he may be advised.

From this judgment the defendants, by special leave, appealed to the Court of Appeal. The plaintiff also entered a cross-appeal against the judgment, submitting that the judgment was wrong in directing a new trial, and that the verdict of the jury should stand, and the judgment of the trial Judge be affirmed.

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The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 29th January and 1st February, 1909.

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the defendants. It is not contended that the deceased was a trespasser—he was a licensee, to whom no special duty was owed by the defendants, and, as in any other case of negligence, the onus is on the plaintiff to prove his case. As regards the direction of a new trial, the Divisional Court had no power to make the order, and, even if they had the power, they should not have exercised their discretion in the way they did: *Hipgrave v. Case* (1885), 28 Ch. D. 356, *per* Selborne, L.C., at p. 361; *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765, the words of Chitty, L.J., at p. 774, being specially applicable: “The trial has taken place, and it is not possible now to make any amendment by adding parties or otherwise.” We refer also to *Raleigh v. Goschen*, [1898] 1 Ch. 73, *per* Romer, J., at p. 81. [OSLER, J.A., referred to *Willett v. Watt & Co.* (1892), 8 Times L.R. 533, [1892] 2 Q.B. 92, as being against the defendants’ view as to the power of the Court in such a case.] Even though that case should favour the view that the Court had the power, it left open the question whether the Court should exercise its power in such a way as to defeat a statute of limitation: *Hudson v. Fernyhaugh* (1889), 61 L.T. 722, in appeal (1890), 88 L.T.J. 253; *Lancaster v. Moss* (1899), 15 Times L.R. 476. In this case, at all events, a new trial should not have been ordered, as the plaintiff had had a full opportunity to present his case, and Courts should not encourage re-litigation: *Glasier v. Rolls* (1889), 42 Ch. D. 436, *per* Cotton, L.J., at p. 459, [MEREDITH, J.A., referred to *Eyre v. Highway Board of New Forest Union* (1892), 8 Times L.R. 648.] We refer also to *Hollis v. Burton*, [1892] 3 Ch. 226.

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The action should have been dismissed on the ground of the absence of the notice required by the statute. There had been no waiver of this objection at the trial. Foreigners and native Canadians should be placed in the same position as regards the giving of notice. It was not necessary that it should be given by the administrator of the deceased—it may be given by the solicitor for the plaintiff, or any other person. The right of action is not at common law, but under a statute, of which, therefore, the conditions must be strictly observed. *Stone v. Hyde* (1882), 9 Q.B.D. 76, *Cox v. Hamilton Sewer Pipe Co.* (1887), 14 O.R. 300, and *Mason v. Bertram* (1889), 18 O.R. 1, are cases which shew that the notice may be given by any one. It must, however, be addressed to some one, so the mere receipt of a newspaper containing an account of the accident would not be sufficient: *O'Connor v. City of Hamilton*, 10 O.L.R. 536.

H. L. Dunn, for the plaintiff. The two main grounds urged by the appellant company are: (1) that the Divisional Court should not have allowed the plaintiff to amend his pleadings; and (2) the want of notice. As to the latter point, I rely on the statement of the case in the judgment of the Divisional Court, and I submit that the difficulty in dealing with foreigners, not speaking our language, and in ascertaining the circumstances, so as to draw the required notice, shew that there was "reasonable excuse" for the plaintiff delaying action for a few days. As to the other point—supposing the amendments permitted by the Divisional Court should be made, the plaintiff would not thereby be setting up a new case. The writ of summons in the action would cover the claim suggested by the Court below, as well as that set up in the pleadings and at the trial. The plaintiff, however, maintains, by his cross-appeal, that the jury having found negligence by the defendants in letting off steam improperly, and in there being no proper outlook on the engines, the verdict and judgment at the trial should be restored. The Divisional Court has erred in its interpretation of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act. The following cases and authorities were referred to: *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; *Beven on Negligence*, 3rd ed., pp. 442 and 690; *Sullivan v. Waters* (1864),

14 Ir. C.L. 460; *Gallagher v. Humphrey* (1862), 6 L.T.N.S. 684; *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, 2 C.P. 311; *Holmes v. North Eastern R.W. Co.* (1869), L.R. 4 Ex. 254, affirmed on appeal (1871), L.R. 6 Ex. 123; *Wright v. London and North Western R.W. Co.* (1876), 1 Q.B.D. 252; *Thatcher v. Great Western R.W. Co.* (1893), 10 Times L.R. 13, where Lopes, L.J., says: "If a person permitted another to come on his premises, and knew him to be on the premises, it was his duty to take reasonable care not to injure him." I refer also to *Spence v. Grand Trunk R.W. Co.* (1896), 27 O.R. 303; *Collier v. Michigan Central R.W. Co.* (1900), 27 A.R. 630; *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316, especially at p. 322, *per* Ritchie, C.J. See also *Wallman v. Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 82, where a good many authorities are collected.

Hellmuth, in reply, argued that there was no real reason for not giving notice, as the notice required is only a notice of injury, and not of claim, and can be given by any one: Ruegg's Employers' Liability, 6th ed., p. 62. In connection with the cross-appeal, the following cases were referred to: *Bolch v. Smith* (1862), 7 H. & N. 736; *Harrison v. North Eastern R.W. Co.* (1874), 29 L.T.N.S. 844; *Castle v. Parke* (1868), 18 L.T.N.S. 367; *Jones v. Grand Trunk R.W. Co.* (1888), 16 A.R. 37; *French v. Hills Plymouth Co.* (1908), 24 Times L.R. 644; *Simkin v. London and North Western R.W. Co.* (1888), 21 Q.B.D. 453; *Hickey v. Rio Grande Western R.W. Co.* (1905), 82 Pac. Rep. 29; *Louisville and Nashville R. Co. v. Lee* (1903), 33 Southern Rep. 897.

May 5. OSLER, J.A.:—The Court below was of opinion that the plaintiff's case could not be sustained under clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, and with that I agree, but they held that the justice of the case required that he should have an opportunity of supporting it, if he could, under clause 1 of the same section, there being evidence in that direction, though the point is not made on the pleadings, nor was the action so launched or tried. The defendants strenuously urged that the plaintiff ought not to have an opportunity of thus making a new case, especially as the time had elapsed

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within which a new action could be brought. The case of *Willetts v. Watt & Co.*, [1892] 2 Q.B. 92(C.A.), is, however, an authority which well supports the judgment of the Court below in this respect. That was an action under the Employers' Liability Act, 1880, to recover damages for personal injuries, and the plaintiff in his particulars of negligence alleged that there was a defect in the condition of the way within the meaning of sec. 1, sub-sec. 1, of that Act, and on that footing the case was tried, and the plaintiff had a verdict, which was set aside and the action dismissed by a Divisional Court. On appeal the Court of Appeal agreed with the Court below that the case was not sustainable under that clause, but, being of opinion that there was evidence on which it might be sustained under sub-sec. 2 of the same section, they held that justice required them to give the plaintiff an opportunity of having the case tried upon its merits, and a new trial was accordingly granted upon terms, the particulars being amended and the plaintiff being ordered to pay the costs in the Divisional Court and the Court of Appeal, the costs of the former trial to abide the event.

Upon the merits this case is probably not so strong as the case just referred to, but we should not interfere with the discretion of the Court below on that ground. The appeal, however, must be allowed, I cannot but regret to say, upon the other objection which has been taken to the judgment, namely, that no reasonable excuse has been shewn for not having given, within proper time, the notice of the injury, as required by sec. 9 of the Act. I agree with what has been said by my brother Garrow as to this, adhering to the view I took of the law in *O'Connor v. City of Hamilton*, 10 O.L.R. 529, at p. 536, as applicable to the facts disclosed on the evidence.

GARROW, J.A.:—Appeal by the defendants against the judgment of a Divisional Court granting a new trial, on appeal by the defendants from the judgment at the trial before Clute, J., and a jury in favour of the plaintiff.

The plaintiff sued as administrator to recover damages caused by the death of his brother Michele Giovinazzo, caused it is said by the negligence of the defendants.

The deceased was a workman in the defendants' employment at their yards at Toronto Junction. A few minutes after six o'clock p.m. of the 19th September, 1907, he, with other workmen, was returning from work, and, as they had been accustomed to do, they were passing along and over the tracks in the yard, to reach the subway and exit, when the deceased was struck by an engine and killed.

The jury found, in answer to questions, that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants', such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; that there was no contributory negligence; and they fixed the damages at \$600.

The Divisional Court was of the opinion that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Railway Act (Dominion), because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend.

The Court also held that the circumstances were sufficient to excuse the giving of a written notice, as required by R.S.O. 1897, ch. 160, sec. 9, no such notice having been given in time.

The defendants appeal from this judgment in so far as it grants leave to amend and a new trial, and the plaintiff cross-appeals, and asks to have the judgment at the trial restored.

A careful perusal of the evidence has led me to the conclusion that the true position of the deceased at the time of the accident was not that of a mere licensee, as held by the Divisional Court, but of a person upon the defendants' premises by their invitation, and one to whom, therefore, the defendants owed a duty to take reasonable care that he should not be injured, within the rule

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laid down in such cases an *Indermaur v. Dames*, L.R. 1 C.P. 274 and 2 C.P. 311, and *York v. Canada Atlantic Steamship Co.* (1893), 22 S.C.R. 167.

It is not, however, in the result necessary to discuss at any length this point of view, because it seems to me that the plaintiff must fail upon the question of the want of notice.

The right to recover damages caused by the negligence of a fellow-servant is, of course, based entirely upon the statute; and that right is conferred upon condition (sec. 9) that notice that injury has been sustained is given within twelve weeks, and the action commenced within six months from the occurrence of the accident, or, in case of death, within twelve months from the time of death, provided that in case of death the want of such notice shall be no bar to the maintenance of the action if the Judge shall be of opinion that there was reasonable excuse for such want of notice: see also secs. 13 and 14.

The death occurred on the 19th September, 1907. The plaintiff heard of it on the 7th November, 1907, while at Kenora, in this province. He came to Toronto on the 5th December, 1907, and, not later than the 7th December, had consulted his present solicitor and instructed him to obtain a settlement of the claim, or in default to bring suit.

The time for giving the notice did not expire until the 12th December, 1907, and, however sufficient the excuse may have been for the time lost before the solicitor was instructed, after that it would be entirely another matter. The interval from the 7th to the 12th was, of course, ample in which to have given the notice, and the only excuse offered for not having done so during that interval is the solicitor's mistaken idea that he could not give the notice until he had obtained letters of administration.

The question, therefore, really resolves itself into this: is ignorance of the law a "reasonable excuse," which question must, I think, be answered in the negative if any useful effect is to be given to the provision.

In *O'Connor v. City of Hamilton*, 10 O.L.R. 529, at p. 536, Osler, J.A., says: "In the present case it is enough to say that the plaintiff was not misled by any one into not giving notice and was under no disability except that of ignorance (of the law), which

can hardly be invoked as excuse for omitting to observe the requirements of the Act." The question there, it is true, arose under the Municipal Act, in which it is said the requirements as to notice are somewhat more strict than under the Workmen's Compensation for Injuries Act (see *Armstrong v. Canada Atlantic R.W. Co.*, 4 O.L.R. 560); but upon such a question as this it would be, I think, wholly illogical and unreasonable to hold that ignorance is an excuse under the one Act, and not an excuse under the other.

For these reasons, I think the appeal should be allowed, and the action dismissed; but under the circumstances the whole should be without costs.

MEREDITH, J.A.:—My opinion is that this action failed, and ought to have been dismissed, on two distinct grounds: (1) want of the notice which the Act requires; and (2) want of proof of any negligence on the part of the defendants.

According to such cases as *Trice v. Robinson* (1888), 16 O.R. 433, and *Doyle v. Diamond Flint Glass Co.* (1905), 10 O.L.R. 567, and to expressions of opinion in such cases as *Johnston v. Dominion of Canada Guarantee, etc., Co.* (1908), 17 O.L.R. 462, which this Court would doubtless feel bound to follow, the plaintiff might have given a valid notice such as the Act requires, and indeed might have brought this action rightly, before obtaining his letters of administration. If notice were not given because the plaintiff's advisers thought that it would be ineffectual before the letters of administration were issued, that mistake was one of law, and it has, generally, I think, been held that a mistake of law does not excuse. No other excuse has been put forward. But, assuming that a mistake of law might excuse, what reasonable excuse can there be in this case? Can any one be said to have a reasonable excuse unless he has done all that he would reasonably be expected to do? In due time competent solicitors were retained by the plaintiff for the one purpose of making the claim in question; but no notice of any sort was given within the time prescribed by the Act, though the provisions of the Act in that respect were well known; nor was any such notice given when the letters of administration were

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obtained, nor until many weeks afterwards. The Act requires a reasonable excuse; the Courts ought not to pervert that into any sort of a pretext. Any person, knowing, as the plaintiff did, the requirement of the Act, and desiring to do that which was reasonable, and anything like fair to the defendants, would have given such a notice as the Act requires within the prescribed time, so that the defendants might have the benefit of such a notice, and also so as to strengthen proof that they were not prejudiced by the want of notice from a hand legally qualified to give it; and he would have followed that up by a notice, such as the Act requires, immediately after becoming, as he believed, for the first time legally qualified to give it. Giving notice long afterwards shews that the plaintiff, or those to whom he had from the first entrusted his case, knew that something ought to be done, but at that very late day it could not be of any avail; it cannot afford even a plausible pretext for thitherto failing to give any sort of notice such as the plaintiff knew the legislature intended that the defendants should have. My views upon this subject are fully set out in the case of *O'Connor v. City of Hamilton* (1904), 8 O.L.R. 391, 398, and so need not now be repeated.

Upon the other question—whether there was proof of any negligence on the part of the defendants—it was contended that the driver of the engine was negligent in opening the cylinder cocks of his engine when he might have known that workmen might be passing. But no damage arose from that necessary act, and no one was injured by the discharged steam or water, if it was so discharged. Admittedly it was a proper, indeed an imperatively necessary, thing to do at times; and that it was not done at the proper time and in a proper place, so far as the requirements of the engine were concerned, was not attempted to be proved; and there was no evidence of any other place where it might with greater safety be done. There was no difficulty in stepping out of the way of the discharged steam or water; the difficulty and the disaster arose altogether from the fact that there was another engine moving, upon another track, at the same time; so that when the man stepped out of the way of the discharge from the one, he ran into the way of the other engine and was run over and killed, although the other two men with him experienced no

difficulty. If there were any negligence on the part of those in charge of the first mentioned engine, it was in not observing the whole complication of events, foreseeing what might possibly happen, and averting it; not seeing both the man and the proximity of the other engine, and not anticipating that some one might, unobservant of the other engine, be put in some danger by it; but there was no finding of negligence in that respect, and I cannot think that, upon the whole evidence, there rightly could be.

The accident seems to have been one of those which are more or less inseparable from an occupation necessarily dangerous; or in pursuing a course, or way, from which it is impossible to remove every element of danger.

The granting of a new trial to enable the plaintiff to set up an entirely new case was, I think, contrary to proper practice, and unfair to the defendants, who had wholly succeeded in the action, as carefully and deliberately presented by the plaintiff, and who were held entitled to have it dismissed: see *Eyre v. Highway Board of New Forest Union*, 8 Times L.R. 648.

If the plaintiff have any other cause of action he is at liberty to prosecute it in the usual way. No injustice is done in pursuing the regular course; injustice may be done, and, indeed, must be done, when the successful party is deprived of his rights upon the issues which have been tried, in order that a new case entirely may be made against him; whilst if accorded those rights—a dismissal of the action as brought with costs—there can be no substantial object in retaining that action instead of bringing a new one; and grave injustice may be done, as, for instance, in depriving the opposite party of the benefit of a statute of limitations. If it were clear that the plaintiff had a good cause of action, upon which he must succeed when duly presented, and which through some mistake, as to which he was blameless or excusable, was not sooner presented, the case would be different. But this case is entirely different from that; the suggested new cause of action is at best a forlorn hope, not supported by the evidence, nor suggested by any one until the case reached the Divisional Court; indeed, the evidence, as far as it goes, is altogether opposed to it; there is nothing whatever to indicate

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that the workmen had not a safe and proper way to and from their work without passing along the tracks; they seem to have adopted that course of their own motion as a short cut, knowing of all the dangers to be encountered in going that way, including that which caused the man's death.

I would allow the appeal and dismiss the action.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

G. G.

[IN CHAMBERS.]

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 July 26.

FLORENCE MINING CO. v. COBALT LAKE MINING CO.

Appeal to Privy Council—Security—Payment of Money into Court—R.S.O. 1897, ch. 48, sec. 2—Con. Rules 831, 833.

Where the security required upon an appeal to the Privy Council is given by payment of money into Court, instead of by a bond in the penal sum of \$2,000, as provided by Con. Rule 831, the sum paid in must not be less than \$2,000, having regard to the provisions of sec. 2 of R.S.O. 1897, ch. 48; the explicit language of the section cannot be held to be varied by the general words of Con. Rule 833.

THE plaintiffs, desiring to appeal to the Privy Council from the judgment of the Court of Appeal, 18 O.L.R. 275, moved for an order allowing them to pay \$1,000 into Court, in lieu of giving a bond for \$2,000, as security for the prosecution of the proposed appeal.

The motion was heard by Moss, C.J.O., in Chambers, on the 21st July, 1909.

R. U. McPherson, for the plaintiffs.

M. Lockhart Gordon, for the defendants.

July 26. Moss, C.J.O.:—This is a motion made on behalf of the plaintiffs for leave to pay into Court the sum of \$1,000, in lieu of giving a bond in the penal sum of \$2,000, as provided by Con.

Rule 831,* as security for the prosecution of an appeal to His Majesty in His Privy Council.

Objection is made on behalf of the defendants that, having regard to R.S.O. 1897, ch. 48, the sum is insufficient.

Section 2 of ch. 48 enacts that "no such appeal shall be allowed until the appellant has given security in \$2,000, to the satisfaction of the Court appealed from, that he will effectually prosecute the appeal," etc.

I see no escape from the plain meaning of the enactment. The appellant is required to give security to the extent of \$2,000 in some form satisfactory to the Court; and obviously security in \$2,000 is not given by paying one-half of that sum into Court.

A bond given under Con. Rule 831 must be in the penal sum of \$2,000, and that answers the requirement of the statute as to the amount of the security to be given by way of indemnity to the respondent. There appears to be no warrant for saying that the amount may be cut down notwithstanding the statute.

Mr. R. U. McPherson, for the plaintiffs, referred to Con. Rule 833,† which declares that the provisions of Con. Rule 830 shall apply to security given under Con. Rules 831 and 832, and urged that the effect of sub-clause 8 of Con. Rule 830‡ is to enable the Court to do, in the case of an appeal to the Privy Council, what is authorised to be done by the appellant without special order in the case of an appeal to this Court, *viz.*, satisfy the requirement as to giving security for costs in the form of a bond, by payment into Court of a sum equal to one-half of the penalty.

*831. The security to be given in cases of appeal to His Majesty in Privy Council, shall be personal, and by bond to the respondent, such bond to be executed by two sufficient securities (except in special cases), as mentioned in Rule 830, in the penal sum of \$2,000, the condition of which bond shall be to the effect that the appellant shall and will effectually prosecute his appeal, and pay such costs and damages as shall be awarded in case the judgment appealed from shall be affirmed, or in part affirmed.

†833. The provisions of Rule 830 shall apply to security given under Rules 831 and 832.

‡830. Where security is required under Rules 826 or 827, the security, unless otherwise ordered by the Court or Judge, shall be regulated by the following provisions:—

1. The security shall be by bond . . .

8. Instead of giving a bond the appellant may without order pay into Court a sum of money equal to half the penalty of the bond . . .

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It was said that orders similar to that which I am asked to make have been made in other cases, but no reported decision was referred to, and I am not aware of any. Any orders of the kind must, I think, have been made on consent or without objection on the part of the respondent.

Whatever may have been the object of Rule 833, I do not think it can have been intended to interfere with the right of the respondent to security to the extent of \$2,000, as provided by R.S.O., ch. 48, sec. 2. I do not think the very general words of the Rule should be held to vary in such a material particular the explicit language of that section. I am inclined to think that the object of Rule 833 was merely to assimilate the practice and procedure in regard to the filing of bonds and the allowance thereof, but it is not necessary to express a decided opinion upon the point.

I think that if the plaintiffs do not desire to give a bond under Rule 831 they must pay into Court the sum of \$2,000.

I reserve the final disposition of this motion until they have had an opportunity of determining which course they will adopt.

G. G.

[IN THE COURT OF APPEAL.]

O'BRIEN V. MICHIGAN CENTRAL R.R. CO.

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Sept. 20

Master and Servant—Injury to Servant—Negligence—Railway—Fall of Lump of Coal from Locomotive Tender—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Res Ipsa Loquitur—Release—Evidence—Invalidity.

The plaintiff was in the employment of the defendants, and, while at work upon a railway track, was struck by a lump of coal which fell from the tender of a passing locomotive, and injured. It appeared from the evidence, in an action for damages for the injury sustained, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train shook down the lump, which, falling upon the corner, flew off with dangerous force and struck the plaintiff:—

Held, that the unexplained fall of the coal, in the circumstances stated, was in itself evidence from which an inference might well be drawn that those in charge or control of the locomotive (Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, sub-sec. 5) were negligent in their mode of using it by piling or permitting coal to be piled upon the tender so high and without protection that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away; and a verdict for the plaintiff for \$1,500 under the Workmen's Compensation for Injuries Act, was upheld.

Doctrine of *res ipsa loquitur* explained and applied.

The defendants set up as a bar to the action a release signed by the plaintiff, after action, in consideration of \$300 paid to him by the defendants. The plaintiff was without independent advice, and stated that he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, including the doctor, being under the impression that at the end of the period for which he was being paid he would be well and back at work:—

Held, that, as the plaintiff's statement was believed by the trial Judge, a finding against the validity of the release should not be disturbed. Judgment of CLUTE, J., affirmed.

AN appeal by the defendants from the judgment of CLUTE, J., who tried the action without a jury, in favour of the plaintiff for the recovery of \$1,200 and costs.

The plaintiff was in the employment of the defendants as a section-man, and, while he was at work upon the railway track, he was struck by a lump of coal which fell from the tender of a passing locomotive, and injured.

The plaintiff claimed \$5,000 damages on the basis of the defendants' common law liability, and, alternatively, \$2,000 damages on the basis of the defendants' liability under the Workmen's Compensation for Injuries Act.

The defendants pleaded "not guilty by statute;" that notice

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of injury was not served upon them within the time limited by the Workmen's Compensation for Injuries Act; and a release of the cause of action in consideration of the payment to the plaintiff of \$300, etc.

CLUTE, J., found that the notice of injury was given too late, but that there was reasonable excuse for not giving it in time, and that the defendants had not been prejudiced; that a release was executed by the plaintiff, but should not be allowed to stand; and that the evidence was sufficient to support the plaintiff's claim under the Workmen's Compensation for Injuries Act, in respect of which he assessed the damages at \$1,500, and directed that the \$300 paid to the plaintiff should be deducted therefrom.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., on the 30th April, 1909.

I. F. Hellmuth, K.C., for the defendants. The finding of the trial Judge as to the release is against the evidence, and should be reversed. The finding of negligence should also be reversed; there is no evidence to shew the cause of the fall of the lump of coal from the tender, and it is not, under the authorities a case of *res ipsa loquitur*. See Beven on Negligence, 3rd ed., p. 129 *et seq.*; *Gulf Colorado and Sante Fe R. Co. v. Wood* (1901), 63 S.W.R. 164.

J. M. Godfrey and *W. A. Henderson*, for the plaintiff, *contra*, referred upon the question of the release to *Begg v. Toronto R.W. Co.* (1905), 6 O.W.R. 239; *Lyall v. Edwards* (1861), 6 H. & N 337; *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499; *Smith v. McIntosh* (1906), 13 O.L.R. 118; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Johnson v. Grand Trunk R.W. Co.* (1894), 25 O.R. 64; and upon the question of negligence and the doctrine of *res ipsa loquitur* to *McCord v. Cammell*, [1896] A.C. 57; *Kearney v. London Brighton and South Coast R.W. Co.* (1871), L.R. 6 Q.B. 759; *Byrne v. Boadle* (1863), 2 H. & C. 722; *Crawford v. Upper* (1889), 16 A.R. 440; *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155; Beven on Negligence, 3rd ed., pp. 111, 119; *Union Pacific R. Co. v. Erickson* (1894), 29 L.R.A. 137.

Hellmuth, in reply, cited *Asbestos and Asbestic Co. v. Durand* (1900), 30 S.C.R. 285.

September 20. The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover damages for an injury caused to the plaintiff under somewhat unusual circumstances. He was in the defendants' employment as a section-man, and, while he was working upon the railway track, a train from the east came along, and a piece of coal fell from the tender and struck him on the ankle, which was thereby fractured.

On seeing the train coming the plaintiff moved back "15 or 25 feet" from the track, and what followed is thus described by him in his evidence:—

"Q. What next happened? A. A chunk of coal came off the tender and struck me on the ankle.

"His Lordship: Q. Do you mean fell off by the motion of the train? A. By the motion of the train.

"Q. Was there a curve there? A. No, a straight track.

"Mr. Henderson (the plaintiff's counsel): Q. What condition was the coal in the tender? A. Piled up, it was piled up like this you see, and rolled off, it rolled down and struck the corner of the tender.

"Q. Can you give us any idea how high the coal was piled up? A. Not exactly.

"His Lordship: Q. It rolled off and struck the corner of the tender, and what then? A. Flew towards me.

"Mr. Henderson: Q. What did you do? A. Fell over on the ground to escape it.

"Q. Have you seen other tenders loaded with coal? A. Yes, I have, sitting in the hotel window.

"Q. What can you say with regard to the height of the coal on this tender as compared with others? A. I could not exactly say, it would be about the same, but then they were piled up just the same.

"His Lordship: Q. Is it usual for the coal to be piled up in that way? A. I see a good many of the engines piled up that way.

"Q. You never saw any that fell off? A. I don't want to see any more.

"Mr. Henderson: Q. Did you ever see any other? A. No, only just starting away they drop off some small chunks.

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"Q. At what rate was the train going? A. I could not say exactly. It was going at a high rate of speed.

"Q. And was the tender shaking? A. Well, I did not notice that; sometimes she is shaking when she gets on a level track; when I saw the coal she must have been rocking like that to start the coal down. As soon as I seen it I started to protect myself.

"Q. When the coal struck the corner of the tender what happened after that? A. Why it came at an angle like, and went off in a corner.

"Q. What happened to you? A. I got struck by it, somewhere below the ankle and got a broken ankle."

The defendants pleaded: (1) "not guilty by statute;" (2) that notice of injury had not been given within the time limited by the Workmen's Compensation for Injuries Act; and (3) a release after action.

Clute, J., held that, although the notice of injury was too late, there was reasonable excuse for not giving it in time, and that the defendants had not been prejudiced, as was indeed admitted; that the release had been obtained under circumstances which, having regard to the physical and mental condition of the plaintiff, rendered it inequitable that it should be allowed to stand; that the evidence was sufficient to support the plaintiff's claim under the Workmen's Compensation for Injuries Act; and he awarded \$1,500 as damages, upon which the \$300 paid when the release was obtained was to be credited.

The defendants apparently acquiesce in the judgment upon the question of notice of action, since no argument was addressed to this Court upon that subject, nor is it mentioned in the reasons of appeal. But the findings of the learned Judge upon the other questions are both strenuously objected to.

Dealing first with the question of the release; it is of course obvious that in determining this issue (which was tried separately) much would depend upon the mental and physical characteristics of the plaintiff as displayed in the witness-box. It may not be in the usual sense a question of credibility, that is, the bald question whether the plaintiff or the very respectable witnesses called by the defence should be believed, but rather whether the plaintiff himself, who had not been protected by

independent advice, could be believed in stating that, no matter what was explained, he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, headed by the doctor, apparently being under the impression that at the end of the period for which he was being paid he would be well and back at work. The plaintiff was evidently believed by the learned Judge, and, that being so, I think his conclusion upon this branch should, under all the circumstances, not be disturbed.

Upon the merits or main branch as it may be called, I also, after some hesitation, agree with Clute, J.

The evidence of negligence is, it is true, meagre, unusually so, but it sufficiently appears, I think, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train could and did shake "down" the "chunk," which, falling upon the corner, flew off with dangerous force and struck the plaintiff.

Mr. Hellmuth, of counsel for the defendants, contended that the maxim *res ipsa loquitur* has no application in cases of negligence between servant and master, and relied upon the remarks to be found in Beven on Negligence, 3rd ed., at pp. 129, 130. But what is there said, taking it altogether, only amounts to this, that liability does not arise from mere proof of the accident, a statement which might, I think, safely be made concerning other actions than the two which the learned author mentions, namely, actions for injuries upon highways, and actions by a servant against a master.

As I understand it, the application of the maxim, which after all is a mere phrase and not a rule of law, never dispenses with any necessary proof, but is only intended as a guide to the point in the evidence at which the burden of proof is shifted. Negligence consists of two elements, namely, the duty to take care and its breach, the burden of proving both of which originally rests upon the plaintiff.

The maxim has nothing to do with the former; and in the case of the latter only determines that when the plaintiff has given evidence of the duty and also of a certain condition of things

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causing or conducing to the injury complained of, he has proved enough to call for explanation by the defendant; in other words, the burden of proof is shifted. So understanding the matter, I see no reason why the maxim is not as applicable in such cases as this as it is in any other case of negligence. The limited class of things appearing in proof to which the maxim will be applied may be perhaps best illustrated by a citation or two. In *Smith v. Baker*, [1891] A.C. 325, at p. 335, Lord Halsbury, L.C., says: "I think the unexplained and unaccounted for fact, that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation." And in *Scott v. London Dock Co.* (1865), 3 H. & C. 596, in the Exchequer Chamber, at p. 601, Erle, C.J., delivering the considered judgment of the Court, said: "There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

So in this case, the unexplained fall of the coal, under the circumstances stated, is in itself, in my opinion, evidence from which an inference might well be drawn that those in charge or control of the locomotive (see sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act*) were negligent in their mode of using it by piling or permitting the coal to be piled upon the tender so high and so unprotected that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away.

The plaintiff's evidence may be meagre, but it was uncontradicted. Indeed, he appears to have not been cross-examined

*R.S.O. 1897, ch. 160, sec. 3: "Where personal injury is caused to a workman— . . .

"5. By reason of the negligence of any person in the service of the employer who has the charge or control of any points, signals, locomotive, engine, machine, or train upon a railway . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

as to any of the statements which I have quoted and upon which the judgment rests. Nor was any evidence whatever given by the defendants in explanation or excuse—circumstances which, while they would not of course excuse a lacking vital element, yet cannot but in some degree enhance the testimonial value of the evidence actually given by the plaintiff. So that, upon the whole, I am of the opinion that there was not only some evidence of negligence, but quite enough to justify the inference drawn by Clute, J.

See the very similar cases of *Gulf Colorado and Santa Fe R. Co. v. Wood*, 63 S.W.R. 164, and *Union Pacific R. Co. v. Erickson*, 29 L.R.A. 137.

The appeal should be dismissed and with costs.

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McDOUGAL V. VAN ALLEN CO. LIMITED.

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June 8.

Master and Servant—Traveller—Payment by Commission—"Good and Accepted Orders"—Interpretation of Contract—"Continuously"—Incapacitation by Use of Drugs—Wrongful Dismissal—Temporary Illness—Self-caused Illness—Borrowing Money from Customers—Allowing Employer's Goods to be Seized for Rent—Justification of Dismissal.

By agreement in writing between the plaintiff and the defendants, the plaintiff was, as traveller for the defendants, "continuously" for a period of three years to take orders for goods to be supplied by the defendants from samples furnished by them, and to take care of all samples and return the same from time to time as requested; and the defendants were to pay him eight per cent. "on all good and accepted orders."

Held, that "good and accepted orders" was not synonymous with "orders accepted and filled;" nor did the words refer only to orders which the customer could by law compel the defendants to fill; but, if the defendants dealt with an order in such a way as to lead the plaintiff and the customer to believe that they intended to fill it, it was "accepted" within the meaning of the contract.

Held, also, that where the defendants received an order for goods and sent it to their factory, that the goods might be made to fill the order, that was an acceptance of the order within the meaning of the contract.

The plaintiff, who was a man of nervous temperament, contracted a cold, and about July, 1907, commenced to use a certain catarrh cure which contained cocaine, and this drug, by his increasing use of the cure, reduced him to such a nervous wreck that in October, 1908, he was taken to a

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sanitarium. He recovered by November 29th following, but in the meanwhile his landlord had seized the goods in the house rented by him, and amongst others the defendants' samples, and the defendants had to pay \$135 to recover them, and on October 31st, 1908, the defendants discharged the plaintiff, who brought this action to recover commission and damages for breach of the contract of employment:—

Held, that the plaintiff was entitled to damages, inasmuch as his illness was not such as indicated that he would not be able to perform his contract for a substantial part of the unexpired period, and therefore not such as to put an end to the agreement in a business sense.

Held, also, that neither the use of the word "continuously" in the contract made any difference, nor the fact that the illness of the plaintiff was brought on, to a great extent, if not wholly, by his own folly, inasmuch as the illness of a nervous subject, allowing himself to be overcome by a seductive drug which saps his powers of self-control as well as his physical strength, cannot be fairly taken out of the category "act of God."

Held, also, that the fact that the plaintiff had borrowed certain sums of money from customers of the defendants, did not justify the dismissal, inasmuch as none of the witnesses said that the borrowing had in the least affected them, nor seemed to think the less of the plaintiff or of the defendants on account of it.

Held, also, that the fact that the plaintiff has permitted the defendants' property to be seized for rent, in spite of the provisions in the contract, about taking care of the samples and returning the same as required, did not justify the dismissal, because, though it amounted to a breach of the agreement, it was not wilful, and could be compensated for.

Held, therefore, that the plaintiff was entitled to damages in addition to his commissions; and a reference was directed on both branches of the case; the defendants to be at liberty to prove any set-off or counterclaim.

THIS was an action to recover commission on goods sold, and damages for wrongful dismissal, under the circumstances set out in the judgment, and was tried before RIDDELL, J., without a jury, at Toronto, on June 3rd, 1909.

R. McKay, for the plaintiff.

George Kerr, for the defendants.

Dartmouth Ferry Commission v. Marks (1904), 34 S.C.R. 366, and *Robinson v. Davison* (1871), L.R. 6 Ex. 269, were cited by counsel, as well as some of the cases mentioned in the judgment.

JUNE 8. RIDDELL, J.:—The plaintiff is a commercial traveller, and having been for a time previously thereto in the employ of the defendants, who carry on business in Hamilton (the agreement between them being verbal), on July 5th, 1907, he entered into an agreement in writing with the defendants which is set out in full in the statement of defence. He therein agrees "to carry the samples as furnished by" the

defendants "in the city of Toronto continuously from the 15th day of August, 1907, to the 15th day of August, 1910, and to take orders in the above city from samples as furnished by" the defendants. . . . "Also to take good care of all samples, sample trunks, cases, etc., and to return same from time to time as requested by" the defendants. In consideration thereof the defendants agreed to pay him "the sum of eight per cent. on all good and accepted orders taken at the prices as marked . . . and . . . as directed by" the defendants. Payment of 75 per cent. of the commission was to be "made monthly on all orders taken and accepted" and the balance on August 31st of each year. "This agreement to remain in force for three years from August 15th, 1907."

The plaintiff, who says he is a very nervous man, contracted a cold, and about June or July, 1907, was advised by a friend to try Agnew's Catarrh Cure. He says that he followed the advice of his friend; at first he used this article once a day or once every two or three days, but the habit grew upon him, and finally he used it many times a day. He says that the cure contains a drug (cocaine), and that, although he knew that the use of it was destroying him, he continued its use, apparently having lost much of his will power and power to resist the attraction of the drug. He became more and more a nervous wreck, and at last physically incapable of "carrying the samples." His brother and brother-in-law (the latter of whom had come from New York at least in part to see after him) induced him to go to a sanitarium and be treated for the terrible habit into which he had fallen. He acceded—indeed, I should judge that he was in no condition to be able to refuse—and on October 15th, 1908, was taken by his friends to the sanitarium.

He made a bill of sale to his brother, but made no arrangements for paying his rent, and the landlord seized upon his goods, amongst them the samples, etc., supplied by the defendants. The defendants were obliged to pay about \$135 to recover their property—and shortly thereafter, namely, on October 31st, gave him notice of the termination of the contract. They had not known of his condition until a few days before he went into the sanitarium.

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In the matter of commission the question had arisen several times as to the meaning of the words "good and accepted orders" in the contract. The custom has been, in many instances, for the defendants, upon receiving an order for future delivery, to send the order to their factory, that the goods might be made, but it did occasionally happen that when the time came for delivery there would not be on hand a sufficient quantity of the goods to fill the order in full, and so only part of the goods ordered would be sent. The defendants contended that only such goods as were actually sent could be considered in fixing the commission—the plaintiff contended that he was entitled to commission upon all goods which the defendants received an order for and which they would have filled if they had had the goods, and orders for which they accepted, so far as the customer or the plaintiff had any notice—and orders for which were taken in and sent to the factory for the goods to be manufactured.

While the plaintiff was in the sanitarium, the defendants, through their treasurer, attempted in vain to have the plaintiff accept a contract, in substitution for that in existence, in which substituted contract it was plainly stated that the commission should be computed only upon the goods sent to customers.

The action is two-fold.

1. For the commission computed as the plaintiff claims it should be.

2. For damages for breach of the contract of employment.

In respect of the first matter I am of the opinion that "good and accepted orders" is not synonymous with "orders accepted and filled;" nor do these words refer only to orders which the customer ordering could by process of law compel the defendants to fill or pay damages for failing to do so. If the defendants dealt with an order in such a way as would lead the plaintiff and the customer to believe that they intended to fill it, I think it was "accepted" within the meaning of this contract. And I think that receiving an order for goods and sending it to their factory that the goods might be made to fill the order, is an acceptance of the order within the meaning of the contract.

As it would be impossible at a trial to go into the facts of each order, it should be referred to the Master to determine the

amount to which the plaintiff is entitled, the only declaration to be made now being that an order within the meaning of this contract may be "accepted" by the defendants without being actually filled by them.

As to the second point, it is to be observed that the contract contains no term allowing either party to put an end to it. The law in the case of such a contract is now well settled.

We may exclude from consideration the actual decisions in cases in which an action has been brought by the master against an apprentice or his bondsmen for non-performance of his (the apprentice's) duty. Such cases are *Boast v. Firth* (1868), L.R. 4 C.P. 1; *MacGregor v. Sully* (1900), 31 O.R. 535. See *per* Falconbridge, J. (now C.J.), at p. 539.

Then there are cases in which admittedly the contract has been terminated under the provisions of the contract, such as *K—— v. Raschen* (1878), 38 L.T. 38; and again cases in which admittedly the contract continued and the servant came back to work, the dispute being as to the time of the sickness, such as *Cuckson v. Stones* (1858), 1 E. & E. 248.

The reasons given in these cases may, however, be, and often are, of advantage in considering other cases between master and servant. But the law in a case of the present kind has been recently laid down authoritatively by Courts by whose judgment I am bound.

In *Poussard v. Spiers and Pond* (1876), 1 Q.B.D. 410, the plaintiff's wife agreed with the defendants to sing and play in a new opera for three months. She was taken ill and could not attend the last rehearsals or at the opening night (Saturday) or the first three days of the following week; but she recovered and offered her services for Thursday following. The defendants refused her services, having engaged another artiste. The Court (Blackburn, Quain, and Field, JJ.) held that the question was whether the failure of a skilful and capable artiste to perform in a new piece is so important as to go to the root of the consideration—and, thinking that it was of great importance to the defendants in the case of a new opera, which might run for a longer or a shorter time, and be a profitable or losing concern, that the piece should start well, and consequently the failure of the

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plaintiff's wife to perform in the opening and early performances was a very serious detriment to them, the Court held that the failure under the particular circumstances of the case of the plaintiff's wife went to the root of the matter. It is true that that case is somewhat complicated by the fact that the substituted artiste, it is said, was engaged at the instance of the plaintiff; but the principles have been adopted in the subsequent case now to be considered.

In *Storey v. Fulham Steel Works Co.*(1907), 23 Times L.R. 306, the defendants employed the plaintiff for five years by an agreement containing no clause enabling them to terminate the agreement sooner. This was in August, 1903; toward the end of 1905 he became ill and was absent from time to time; in January, 1906, his illness became more serious, and being examined by a doctor he was ordered complete rest for a time. By the middle of May, 1906, he was able for work again, but in the meantime, on April 6th, 1906, he was discharged. Channell, J. (p. 307), says: "If such an agreement was made, and if the servant was absent from time to time through illness, the loss fell upon the employer. . . . That was clear in the case of an illness that was admittedly temporary. In the case of a permanent illness . . . the employer could give the servant notice then and there. . . . When the non-performance by one party went to the root of the whole matter, the other party could put an end to the contract. If the illness of a servant under an agreement . . . was of such a character as to indicate that the servant never would be able to perform his contract, and something had to be done at once to supply his place, the contract could be put an end to by the employer. . . . Here, the agreement had . . . still two years and four months to run, and the question therefore was, had the defendants any reason to think that the plaintiff would not be able to perform a substantial part of that unexpired period? . . . The defendants came to the conclusion that the best thing they could do was to rescind the agreement." The learned Judge did not think that the defendants at the time of notice "could have thought that the plaintiff never would be able to come back to his work: the loss of that illness must, therefore, be borne by them, as the circumstances were not

such as justified them in thinking that he never would be able to perform the remainder of the agreement."

Upon appeal the Court of Appeal (Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ.) sustained the decision (1907), 24 Times L.R. 89. At p. 90 the Chief Justice, giving the judgment of the Court, says that he adopts entirely the principle "if the illness was such as to put an end, in a business sense, to their business engagement and would frustrate the object of that engagement, then the employer could dismiss the servant and no action would lie against him." And not accepting the view that in January, 1906, there was reason for the defendants to think that the plaintiff would not recover, or would not get better for the two and a half years the engagement had yet to run, he thought that, as Mr. Justice Channell had found as a fact "that the illness of the plaintiff did not put an end to the agreement in a business sense," the appeal should be dismissed.

It is clear that the dictum of Willes, J., in *Harmer v. Cornelius* (1858), 5 C.B.N.S. 236, at p. 247, "There is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired," must be read in connection with the facts of that case.

In the present case there was nothing to indicate that the plaintiff would not recover so as to be able to perform his agreement for the greater part of the time yet unexpired. He did in fact recover by November 29th; and I do not find anything to indicate that the "illness of the plaintiff put an end to the agreement in a business sense."

The use of the word "continuously" in the contract does not, in my opinion, carry the case any further. Had the word not been used, it would have been implied.

Nor, as I think, does the fact that the sickness of the plaintiff was brought on to a great extent, if not wholly, by his own folly, make a sufficient difference. It is true that many of the cases seem to assume that a sickness caused by the plaintiff's own fault will be upon a different foundation from one not so occasioned. See (*e.g.*) the head note in *Cuckson v. Stones*, 1 E. & E. 248; Campbell's edition of Fraser's Master and Servant, p. 140; and the Imperial statute 57 & 58 Vict. ch. 60, sec. 160, makes a dis-

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tion also. The only case actually decided that I have seen is *K—— v. Raschen*, 38 L.T. 38, in which the servant suffered from a disease which he certainly could not have had but for his own act; and it was held that that made no difference. It is true that the act there had been committed before the engagement and may have been a single isolated act, while here the sickness resulted from a series of foolish acts committed after the engagement. Cleasby, B., says, 38 L.T. at p. 40: “*Primâ facie*, illness is to be attributed to the act of God, and we are not justified in going back for any length of time, and entering into an investigation as to what may have been the cause of it.” I do not think that this sickness of a nervous subject, allowing himself to be overcome by a seductive drug which sapped his powers of self-control as well as his physical strength, can fairly be taken out of the category “act of God.” A man differently constituted might have escaped serious injury; the plaintiff’s constitution afforded a suitable and prepared *nidus* for the operation of the poison.

The defendants then contend that the act of the plaintiff in borrowing certain sums of money from their customers justified the discharge. This is not mentioned as a cause in the letter of discharge, October 31st, 1908; but the defendants are entitled to take advantage of any cause for dismissal existing in fact, whether mentioned by them or not, and whether known to them at the time or not: *McIntyre v. Hockin* (1889), 16 A.R. 498.

It makes no difference that the act complained of is not in direct or any connection with the employment: *Pearce v. Foster* (1886), 17 Q.B.D. 536; *Marshall v. Central Ontario R.W. Co.* (1897), 28 O.R. 241.

But I cannot find as a fact that the acts of borrowing which it is admitted the plaintiff was guilty of constituted any serious offence or one which justified dismissal. The rule laid down in a very valuable work, Maedonell on Master and Servant, 2nd ed., p. 175, is: “A servant is bound to act with good faith, and to consult the interests of his master, and may be dismissed for misconduct injurious thereto, though such misconduct does not relate to the servant’s particular duties.” Many illustrations are given of acts which would justify dismissal, and the conclu-

sion arrived at is the old one of Vaughan, J., in *Lacy v. Osbaldiston* (1837), 8 C. & P. 80, that the question is always one of fact. "Has the servant so conducted himself that it would be manifestly injurious to the interests of the master to retain him?" None of the witnesses called for the defendants said that the borrowing had affected them in the least, and they did not seem to think the less of the plaintiff or of his masters on account of the borrowing. On objection taken I would not permit a witness to say whether, in his opinion, such conduct would be of advantage to the defendants—the question was not a matter of expert evidence.

The next matter complained of is more serious, namely, the fact that the plaintiff permitted the property of his master to be seized by his landlord for his rent, thereby occasioning loss and annoyance to the defendants.

In the written contract he agrees "to take good care of all samples, sample trunks, cases, etc., and to return same from time to time as required by" the defendants. The care to be taken of these samples, etc., must extend so far as that he should be at all times in the position of being able to return them upon the demand of the defendants. This agreement he broke, and the question is, does this justify his dismissal?

Irrespective of the peculiar law of master and servant—at the common law, the breach by one party to an agreement of his contract does not justify the other in treating the contract as at an end unless the breach goes to the root of the contract and cannot be properly compensated for: *Simpson v. Crippin* (1872), L.R. 8 Q.B. 14. And the same law exists in employments of a nature not unlike that now under consideration: *Gould v. Webb* (1855), 4 E. & B. 933.

I think, however, that in this case the contract by the plaintiff is not simply an agreement upon his part, but that it also is in effect a statement of what is his duty as a servant in respect of the particular chattels; and that it must be considered that a breach of this agreement by him would be, if intentional, *ipso facto* a breach of his duty as a servant or employee. As at present advised, I think that a wilful disregard of this agreement would justify the masters in discharging the plaintiff.

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But the act, or rather omission, was not intentional. The failure to look after the samples, etc., properly was due to the sickness of the plaintiff. It is not contended that if he had been himself he would have allowed these goods to be seized. I do not think, therefore, that this involuntary default upon this single occasion justified dismissal.

Walker v. British Guarantee Association (1852), 18 Q.B. 277, contains some remarks not wholly inappropriate. No doubt the defendants will have the right to claim damages against the plaintiff for this breach of his agreement, but I do not think the breach efficient for any other purpose.

The plaintiff is entitled to damages, although he was to be paid only a commission: *Laishley v. Goold Bicycle Co.* (1902), 4 O.L.R. 350, (1903), 6 O.L.R. 319; *S.C., sub nom. Goold Bicycle Co. v. Laishley* (1903), 35 S.C.R. 184.

There should be a declaration that the plaintiff was wrongfully dismissed.

Judgment will go for a reference to Mr. Cartwright upon both branches of the case, the defendants to be at liberty to prove any set-off or counterclaim.

As it would not be advisable in a matter involving such small amounts that there should be more than one appeal to the Divisional Court, the time for appealing from any part of this judgment will be extended until after the master shall have made his report, so that if desired the whole matter may be brought on at once before the Divisional Court. Proceeding with the reference is not to be considered a waiver of the right to appeal.

It is to be hoped, however, that the parties will be able to arrange their differences without further litigation.

A. H. F. L.

[IN THE COURT OF APPEAL.]

McKEOWN v. TORONTO R.W. Co.

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Sept. 20.

Fatal Accidents Act—Death of Young Child Caused by Negligence—Pecuniary Loss of Parent—Reasonable Expectation of Benefit—Damages—Jury—Evidence—Judge's Charge.

A verdict of a jury for \$300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisional Court and by the Court of Appeal (Moss, C.J.O., and MACLAREN, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration.

Pym v. Great Northern R.W. Co. (1862), 2 B. & S. 759, and *Blackley v. Toronto R.W. Co.* (1897), 27 A.R. 44n., applied and followed.

The trial Judge's direction to the jury upon the questions of damages and the findings of the jury upon the question of negligence were also considered and upheld by the Divisional Court.

ACTION by Thomas J. McKeown, under R.S.O. 1897, ch. 166, an Act respecting Compensation to the Families of Persons Killed by Accident and in Duels, to recover compensation for the injuries sustained by the plaintiff, in consequence of the wrongful acts of the defendants in negligently, carelessly, and unlawfully causing the death of Thomas Norman McKeown, the plaintiff's son.

The action was tried before FALCONBRIDGE, C.J.K.B., and a jury, at Toronto, on the 12th and 13th October, 1908. The jury answered questions in favour of the plaintiff, and assessed the compensation at \$300, for which amount the trial Judge on the 16th October, 1908, ordered judgment to be entered for the plaintiff with costs.

The defendants appealed to a Divisional Court, and their appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 26th November, 1908.

D. L. McCarthy, K.C., for the defendants.

John MacGregor, for the plaintiff.

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December 18, 1908. MEREDITH, C.J.:—This is an appeal by the defendant company from the judgment in favour of the respondent which the Chief Justice of the King's Bench on the 16th October, 1908, directed to be entered after the trial before him with a jury at the autumn sittings at Toronto on the 12th and 13th days of that month; and in the alternative the appellants ask for a new trial on the ground of misdirection and on other grounds.

The action is brought by the father of a child a little over four years old, who was killed by being struck by a car of the defendants, owing, as the plaintiff alleges, to the defendants' negligence, to recover damages for the death of the child.

Various acts of negligence were relied on at the trial by the plaintiff's counsel, and the jury were directed to answer questions submitted to them, the questions and their answers being as follows:—

1. Were the injuries which resulted in the death of Thomas Norman McKeown caused by any negligence of the railway company or its servants? A. Yes.

2. If so, wherein did such negligence consist? A. In the motorman not acting promptly.

3. Or where such injuries caused by the negligence of the plaintiff? A. No.

4. Or by the negligence of the said Thomas Norman McKeown? A. Yes.

5. Could the said Thomas Norman McKeown, by the exercise of reasonable care, have avoided the accident? A. Children of that age are not responsible.

6. If you answer "yes" to the last question, nevertheless could the defendant company, by the exercise of reasonable care, have avoided the accident? A. Yes.

7. At what sum do you assess the compensation to be awarded to the plaintiff? A. \$300.

Upon these answers the learned Chief Justice directed that judgment should be entered for the plaintiff for the sum at which his damages were assessed.

In support of the alternative case made by the motion to this Court, it was argued for the defendants that the learned Chief

Justice in his charge to the jury improperly referred to the fact that in a recent case "where an action was brought for the death of a child eight years old, he had allowed \$400 damages, and that his decision had been upheld by the Court in appeal," and that he also "improperly suggested to the jury that the defendants might be satisfied to submit to a small verdict," and that this was misdirection entitling the defendants to a new trial.

That, as the fact is, no objection was made to the charge on the first of these grounds, would be sufficient for the disposition adversely to the defendants of that ground; but I desire to say that, even had the objection been taken at the trial, I should have reached the same conclusion.

The charge must, of course, be read in connection with and in the light of what had previously taken place at the trial. The defendants' counsel at the close of the plaintiff's case had moved for the dismissal of the action, on the ground, among others, that it had not been shewn that the plaintiff had sustained any pecuniary damage by the death of his child, and in supporting his motion had referred to the case of *Ricketts v. Village of Markdale* (1899-1900), 31 O.R. 180, 610, the case to which the learned Chief Justice had made reference in his charge, and mentioned the facts and circumstances of that case, though he did not, as far as appears from the shorthand notes, mention the amount which the plaintiff had recovered; that was stated by the learned Chief Justice in his charge to the jury; but, in my opinion, so far from the defendants having been prejudiced by what was said, the observations of the Chief Justice were directed to pointing out the difference between the case with which they had to deal and the *Ricketts* case, and emphasising the fact that in the latter case the child, "though he was so young" (seven years old), "was a real benefit and pecuniary advantage to his parents;" and further on he told the jury that the sum he had awarded in the *Ricketts* case was severely criticised by one of the Judges in the Court, who said that he would not have awarded so large a sum.

In my opinion, the defendants have also failed to establish the other ground of misdirection relied on.

The following are the only parts of the charge which deal with the matter which forms the subject of this ground of objection.

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On p. 137 the learned Judge is reported to have said: "I shew you how closely the line is drawn by the law in order to indicate to you that there is not any object in your endeavouring to benefit this plaintiff by returning any extravagant verdict. If you think that the plaintiff is entitled to succeed, you will best serve his interests by awarding such a reasonable and moderate sum as may have a chance of being upheld in the Court above, because I assure you that any extravagant verdict could not possibly stand." And on pp. 147-8, he is reported to have said: "However, it may be that there has been enough of such services shewn to justify you in rendering a verdict for something, but I warn you again not to think that you are helping the case of the plaintiff by awarding any unreasonable or excessive sum. It might well be that the company, having regard to the dreadful injury inflicted upon these parents, whether they are in fault or not, or assuming that they are not in fault, might assent to a reasonable or small verdict and let it go; but they would certainly invoke the aid of the Court if anything like a substantial verdict were endeavoured to be enforced against them. However, I do not know that you have any right to consider that. With reference to that last observation of mine, I think it is fairer for you to deal with it without reference to anything that the company might or might not do."

Fairly read and as the jury must have understood them, these observations were intended to warn the jury against being led by their sympathies to award large damages, and, so far from being calculated to prejudice the defendants, were, I think, distinctly favourable to them. Even if it were otherwise, the objectionable part of the observations was removed by the concluding words which I have quoted.

The reversal of the judgment is sought on the ground that there was not evidence for the jury either of negligence of the appellants resulting in the death of the child, or of such damage as alone can be recovered in an action such as this.

Two persons only gave testimony as to the circumstances under which the collision between the child and the car took place, Mrs. McDonagh, a witness called by the plaintiff, and Joseph Dalton, a witness called by the defendants, who was the motorman of the car.

According to the testimony of the latter, he was proceeding down Bathurst street at the rate of six or seven miles an hour, with the power off and his car "rolling down," when he saw two children, one of whom, as it turned out, was the deceased child, on the pavement and between the curb and the railway tracks and "fifteen feet, perhaps more," south of the car, running towards the track in a south-easterly direction; he then rang his gong and put on the air brake quickly, which caught, and reversed, but was unable to stop his car in time to avoid striking the children. On cross-examination, he testified that when he first saw the children the car was about fifteen feet from them, and that the children had almost crossed the whole track before they were struck. He also testified that the car went only about half its length from the place where it was when he applied the air brake, before being brought to a stop. Upon cross-examination his statement was that the car went half its length after the children were struck, and at another time that he went "half a car length, between that and a car length," after putting on "the air," and in answer to the last question put to him on cross-examination he said that there was nothing at all to "prevent" his "view of the children" from further back, and again in re-examination he testified that there was nothing to obstruct his view of the children as he came down the street.

Mrs. McDonagh's testimony was that as the car which struck the children was coming down Bathurst street the two children spoken of by the motorman and her "little boy" were standing on the west side of that street; that the latter, seeing the car, said to the girl, "Irene, don't go, there is a car coming," but that the two children started to cross the road, and that when they did so the car was about sixty feet away from them, and that the "front side of the fender near the end" struck the deceased. On cross-examination this witness admitted that at the coroner's inquest she had testified that the car was ten or fifteen feet away from where the deceased was struck when she first saw it, but explained that the reason for her differing statement at the trial was that since the inquest the distance had been measured and had been ascertained to be sixty feet.

Looking now at the answer of the jury to the second question

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—that the negligence found by the answer to the first question consisted “in the motorman not acting promptly”—the question is whether there was evidence to go to the jury of that negligence.

The argument of Mr. McCarthy was that the answer to the second question must be taken to mean that the only negligence with which the motorman was chargeable was not acting promptly in stopping his car after he saw the children crossing at the distance of fifteen feet away, and that there was no evidence whatever to support such a finding.

So narrow a construction ought not, in my opinion, to be given to the answer. It may well mean, I think, that the jury believed the testimony of Mrs. McDonagh, that the children started to cross the street when the car was sixty feet away from them, and not fifteen feet, as the motorman testified, and that, seeing them at that distance, he ought to have anticipated danger to them if the car was not promptly stopped, and that he did not promptly apply the means at his disposal to stop the car, which, on his own statement, he began to use when the car was but fifteen feet away from the children, and which brought the car to a stop after it had proceeded half its length; and, if that be the meaning of the answer, it is impossible to say that there was no evidence to support the finding, for there was abundant evidence in addition to Dalton’s own statement that the car might have been brought to a stop in much less than sixty feet.

The weight to be attached to the testimony of the witnesses was of course for the jury, and it was competent to them, as they appear to have done, to prefer her evidence on the crucial point of the case to that of Dalton.

I am also unable to agree with Mr. McCarthy’s argument on the question as to the damages. It did not differ substantially from that presented to the Court of Appeals of the State of New York in *Houghkirk v. Delaware and Hudson Canal Co.* (1883), 92 N.Y. 219; and dealing with it, after referring to cases of actual, definite loss, capable of proof, and of measurement with approximate accuracy, the Court went on to say: “But the value of a human life is a different matter. The damages to the next of kin in that respect are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to

accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is and there must be some basis in the proof for the estimate, and that was given here and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased; these elements furnish some basis for judgment. That it is slender and inadequate is true . . . ; but it is all that is possible, and while that should be given, . . . more cannot be required:" p. 225.

With this statement of the law I entirely agree, and would be prepared to apply it to this case, unless the law has been differently laid down by decisions binding upon us.

So far, however, from that being the case, the law as laid down in this province is in substantial agreement with the statement of it in the passage I have quoted from the New York decision, and it is settled that it is not necessary to shew by evidence that any pecuniary benefit had been actually received from the deceased: *Ricketts v. Village of Markdale*, 31 O.R. 180, 610; *Lett v. St. Lawrence and Ottawa R.W. Co.* (1884), 11 A.R. 1, affirmed 11 S.C.R. 422.

Two Irish cases, *Holleran v. Bagnell* (1880), 6 L.R. Ir. 333, and *Hull v. Great Northern R.W. Co. of Ireland* (1890), 26 L.R. Ir. 289, in which a different view was taken, were cited by Mr. McCarthy; but it is enough to say, as to these cases, that the decisions of our own Courts must be followed in preference to them, even if I were of opinion—which I am not—that the Irish cases were rightly decided.

I refer also to the following observations of Patterson, J.A., made in the *Lett* case as to the Irish decisions: "The doctrine thus adopted by the Irish Courts may, I think, be fairly stated as being that no injury within the contemplation of Lord Campbell's Act can result from the death of one from whom no benefit has been received during his life. This is so far opposed to the tenor of all the English cases, and to the express decision in some of them, that it is obviously useless to look to the judgments of the Irish Courts for assistance, while we take those of the English Courts as our guide:" 11 A.R. at p. 29.

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In *Blackley v. Toronto R.W. Co.* (1897), reported in a note to *Rombough v. Balch* (1900), 27 A.R. 32, 44, Osler, J.A., said: "The only working rule, therefore, having regard to the other propositions established in respect of the action, is that laid down in *Pym v. Great Northern R.W. Co.* (1862), 2 B. & S. 759, viz., that it is for the tribunal to say, 'under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages.' It has not been decided by any case by which we are bound that there must be evidence of pecuniary advantage derived from the deceased, previous to or at the time of his death. On the contrary, in *Franklin v. South Eastern R.W. Co.* (1858), 3 H. & N. 211, it is said by the Court: 'We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation may well exist, though from the father not being in need, the son had never done anything for him:' " p. 45.

The present Chief Justice of Ontario, in the *Rombough* case, referred to this statement as a summary of the law, after a review of the authorities, and the law thus expounded was applied by the Court of Appeal in that case, and the decision of the Court of Appeal was affirmed by the Supreme Court on the 12th June, 1900: *Balch and Peppard v. Rombough*, Coutlee's Digest (1875-1903), p. 432.

Though no reported case had been cited, nor have I found any, in which an award of damages has been made in the case of a child so young as the deceased child in this case, it is impossible to say that, as a matter of law, his being of such tender years precluded the plaintiff from obtaining the benefit of the Act, the provisions of which he is invoking by his action. All that can be said is that the younger the child is the more difficult it is to determine whether there is such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and to estimate the damages which should be awarded; and there remains, as an insuperable difficulty in the way of the defendants' success, the fact that it was for the jury to determine both

of these matters, there being, as I have already said, evidence proper to be submitted to them.

The result is that, in my opinion, the appeal fails and should be dismissed with costs.

MACMAHON, J.:—I give a grumbling assent.

TEETZEL, J.:—I agree.

The defendants on the 22nd December, 1908, moved before a Judge of the Court of Appeal for leave to appeal to that Court from the order of the Divisional Court; and on the 29th December, 1908, upon the defendants undertaking to pay the costs of the plaintiff as between solicitor and client in any event of the appeal, and waiving any right to the costs of the action and of the appeal to the Divisional Court, in case it should be held that the plaintiff was entitled to any damages, it was ordered that the defendants be allowed to appeal to the Court of Appeal, the appeal to be limited to the question of the right of the plaintiff to damages for the death of his son.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, J.J.A., and MAGEE, J., on the 4th February, 1909.

Wallace Nesbitt, K.C., for the defendants. The sole point is whether the case of this child comes within Lord Campbell's Act. The principles are laid down in Ruegg's *Employers' Liability*, 7th ed., p. 151 *et seq.*, citing *Duckworth v. Johnson* (1859), 4 H. & N. 653, and the Irish cases, including *Bourke v. Cork and Macroom R.W. Co.* (1879), 4 L.R. Ir. 682. The view there given is opposed to the American authorities, with their appeal to sympathy and sentiment. There must be a reasonable expectation of benefit founded upon something in the past. In all the cases up to date in our own Courts there has been some evidence of benefit received. See *Mason v. Bertram* (1889), 18 O.R. 1, and cases there cited: *Blackley v. Toronto R.W. Co.*, 27 A.R. 44n. This is in accord with *Hull v. Great Northern R.W. Co. of Ireland*, 26 L.R. Ir. 289. In the present case it is a mere matter of surmise whether there would have been benefit. There must be something more than the bare possibility of benefit—something like what we have in *Ricketts v. Village of Markdale*, 31 O.R. 180,

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610. All we are told in this case is that the plaintiff is a book-keeper, and that the child ran messages. In the *Duckworth* case the boy was fourteen, and earned 4 shillings a week. See also *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211; *Davidson v. Stuart* (1903), 34 S.C.R. 215, 222.

M. Lockhart Gordon, on the same side, referred to *Thompson v. Trenton Electric and Water Power Co.* (1908), 11 O.W.R. 1009; *Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. 193, 197; *Central Vermont R.W. Co. v. Franchère* (1904), 35 S.C.R. 68; *Hetherington v. North Eastern R.W. Co.* (1882), 9 Q.B.D. 160.

John MacGregor, for the plaintiff. The questions are, whether the father can, in the circumstances, maintain the action, and whether the case was properly submitted to the jury. If the boy had lived after his injury, he could have himself maintained an action for the injury. The *Ricketts* case is the logical result of the *Lett* case. In the *Ricketts* case the boy was seven years old, and earned nothing—all that was shewn was a desire to assist the father. By the Fatal Accidents Act, R.S.O. 1897, ch. 166, sec. 2, a right of action is given where the death of a person has been caused by such wrongful act, etc., as would (if death had not ensued) have entitled the person injured to maintain an action; and by sec. 3 the Judge or jury may give such damages as he or they think proportioned to the injury resulting from such death to the persons for whose benefit the action has been brought. Section 1902 of the New York Code is similar, and the New York cases are applicable. I refer especially to *Medinger v. Brooklyn Heights R.R. Co.* (1896), 6 App. Div. 42; and to the American cases referred to in *Renwick v. Galt, etc., Street R.W. Co.* (1905-6), 11 O.L.R. 158, 12 O.L.R. 35. The questions are for the jury. The damages here are very reasonable. [Discussion of cases cited in the Divisional Court and by counsel for the defendants.]

Nesbitt, in reply. In all the cases reported since 1846 throughout the Empire, there is no case like this. The *Ricketts* case went farther than any previous one, but there the boy really assisted the father by working in the garden and peddling vegetables. In this case the father may have intended to educate the

child for a profession, and so as a matter of pecuniary benefit is a gainer. If damages can be given in this case, why not in the case of an unborn child?

September 20. OSLER, J.A.:—It is the extreme youth of the child for whose death this action is brought which alone causes hesitation in maintaining the plaintiff's right to recover. The damages recoverable under the Act cannot be founded on sentimental considerations, but are to be given in respect of some pecuniary loss only, and that not merely nominal, caused by the death. Here the child was an infant of four years of age, healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age can be said to have. Was its death a damage to the parent within the meaning of the Act? Having regard to the position in life of the latter, I cannot hold that in point of law it was not, or that in the case of a child of that description damages to be estimated by such considerations as the decided cases warrant may not be sustained. The question is for the jury, upon the evidence. It is settled that pecuniary benefit or advantage need not have been actually derived by the beneficiary previous to the death, and therefore the then present inability of the deceased to confer such benefit or advantage is not conclusive against the right to recover. The probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration. *Pym v. Great Northern R.W. Co.*, 2 B. & S. 759, lays down what I have always considered to be the working rule, viz., that it is for the tribunal to say, "under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, so as to become the subject of damages." The age of a child, the probability of its continued life to a period when it will become useful to a parent in the way of performing services which a child of parents in the station of life of the plaintiff usually performs, or of earning money of which such a parent would in the natural course of things have the benefit, are circumstances which a jury may

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properly take into consideration. These are matters of pecuniary value, and "all such circumstances as might in any particular case terminate or abbreviate their enjoyment or diminish their value must be taken into consideration by the jury." Damages in such a case must necessarily be small, and I do not say that in the case of a younger child or of one that is feeble or unhealthy, the probability of their existence may not be diminished to a vanishing point. I do not think that is shewn to be the case in the present instance. The controlling hand of the Court is the safeguard of the defendant against the disposition of the jury to award such extravagant damages as have been given in many of the American cases cited.

I am on the whole of opinion that on the evidence a recovery is warranted by the rule or principle established in the *Pym* case and in such cases as *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211; *Dalton v. South Eastern R.W. Co.* (1858), 4 C.B.N.S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Wolfe v. Great Northern R.W. Co.* (1890), 26 L.R. Ir. 548; *Blackley v. Toronto R.W. Co.*, 27 A.R. 44n.; and others. The cases of *Renwick v. Galt, etc.*, *Street R.W. Co.*, 12 O.L.R. 35, 37 (C.A.), *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648 (C.A.), and *Jackson v. Watson*, [1909] 2 K.B. 193 (C.A.), may also be referred to.

The damages, though they err on the side of liberality, as they usually and perhaps inevitably do in these cases, not being capable of being estimated with exactitude, are not so large as to invite interference, and I would therefore affirm the judgment and dismiss the appeal.

GARROW, J.A.:—No case of authority in this Province was cited, nor have I been able to find one, in which a recovery was had in the case of the death of a child so young (four years) as that of the plaintiff. The nearest is *Ricketts v. Village of Markdale*, 31 O.R. 610, in which the age was eight.

It was long ago determined that it is not necessary in order to maintain such an action that actual pecuniary advantage must have been derived previous to the time of the death, and that a reasonable prospect of future benefit is alone sufficient: see the cases collected and discussed by my brother Osler in *Blackley v.*

Toronto R.W. Co., in a note to *Rombough v. Balch*, 27 A.R. 32, at p. 44.

A reasonable prospect of future pecuniary benefit, although somewhat longer postponed, may not unreasonably be regarded as almost as certain in the case of a four year old child as in that of one twice that age. I at least am unable to see how it can be said that in the one case there is evidence proper for a jury and in the other none. If it appeared that the infant was a cripple or an imbecile, or if its age was so tender that there could be no reasonable evidence given of its mental or physical capacity or condition, it would be otherwise. But in the present case the evidence clearly discloses that the infant killed was a bright and capable boy, both mentally and physically, and I, therefore, agree, reluctantly I admit, that there was evidence which could not have been withdrawn from the jury; and the judgment must therefore be affirmed.

MAGEE, J., concurred.

MOSS, C.J.O.:—This appeal raises a question of importance under the Fatal Injuries Act.

The plaintiff sued under the Act to recover damages from the defendants for the death of his son aged four years and three months, occasioned by the negligence of the defendants, and at the trial recovered judgment for \$300.

The judgment was affirmed by a Divisional Court, and the defendants obtained leave to appeal to this Court on the sole question whether there could be a recovery of damages, the child being of such tender age, and no special circumstances touching the question of the right to damages appearing or being found by the jury.

Questions were submitted to the jury, but the only one referring to damages was as follows: "At what sum do you assess the compensation to be awarded to the plaintiff?" To which the jury answered "\$300."

On this branch of the case the evidence which the jury had before them when considering their award of damages was to the following effect. The plaintiff said his son was four years

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old on the 18th January, and his death occurred on the 9th April following. "Q. What kind of a boy was he physically? A. He was a very healthy child. Q. And how was he intellectually? A. He was remarked for his smartness, and every one that met him or came across him always remarked him for his intellectual abilities. Q. Was he of use to you at all in the house? A. Yes, he was. He was of use to his mother in several ways, such as he was always able to go a message for her if necessary. And other minor things in the house."

Upon cross-examination. "Q. What other children have you? A. Two little girls. He was the only son. Q. Older than he was? A. Yes. Q. And of course he was not going to school or anything of that kind? A. No, he was not going to school just then. Q. And you say he did odd things about the house and ran messages for his mother? A. Yes, little things like that."

A medical man who examined the body after death stated that he estimated him to be three feet nine inches in height and forty pounds in weight and quite healthy. In answer to the question, "What is your business?" the plaintiff replied, "Book-keeper." He was not questioned further as to his means, income, resources, or way of living.

The question is whether upon this evidence the jury acting reasonably could find more than nominal damages. If not, the action cannot be maintained, for the gist of such an action is actual pecuniary damage: see *Boulter v. Webster* (1865), 11 L.T. N.S. 598.

It is quite clear that the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family.

Ever since the decision of the Court of Exchequer in *Duckworth v. Johnson*, 4 H. & N. 653, it has been treated as undisputed law that an action of this nature cannot be maintained without some evidence of actual pecuniary damage. Pollock, C.B., said (p. 657): "It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damages, and to punish those who are guilty of negligence by making them pay costs." Bramwell, B., said (p. 658): ". . . If the jury are solely

to judge in such matters in every case where a child is killed, it will be difficult to prevent them from giving damages by way of solatium; whereas, if the plaintiff is compelled to give evidence of the value of the child's services, and the cost of maintaining him, it might keep the matter straight and prevent injustice being done." And Watson, B., said (p. 659): "On one part of the case I have no doubt, namely, that no action can be maintained . . . unless the person proves actual damage. I am clearly of opinion that negligence alone, without damage, does not create a cause of action."

In that case it appeared that the plaintiff's son, a boy of fourteen years of age, had been working and earning wages of four shillings a week for a year or two, but he was out of employment when he was killed. It was left to the jury to say whether his father, the plaintiff, had sustained any pecuniary damage, and they found for the plaintiff with £20 damages. The verdict was upheld on the ground that there was evidence on which a jury might properly infer that there was a reasonable prospect of pecuniary benefit to the father from the continuance of his son's life.

This view had been taken in two previous decisions, *viz.*, *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211, and *Dalton v. South Eastern R.W. Co.*, 4 C.B.N.S. 296.

In the first of these cases the plaintiff, the father of the deceased, was old and infirm; the deceased, twenty-one years old, was earning good wages and assisted his father in doing the work of carrying up coals to the wards of St. Thomas Hospital, for which the plaintiff was paid 3/6 a week. The jury found for the plaintiff with £75 damages. It was held that the damages should be calculated in reference to a reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of the life, and, the jury having found that the father had a reasonable expectation of his son's life, the action was maintained, but the verdict of £75 was set aside as excessive. Pollock, C.B., said (at p. 213): "The statute does not in terms say on what principle the action given is maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it does, is to shew what it does not, mean. Now it

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is clear that damage must be shewn, for the jury are 'to give such damages as they think proportioned to the injury.' It has been held that these damages are not to be given as a solatium; but are to be given in reference to a pecuniary loss. . . . We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from a continuance of the life."

In the other case the action was brought for the benefit of the father and mother of the deceased. It appeared that he was twenty-seven years of age and unmarried, and living away from his parents, but he had been in the habit of visiting them once a fortnight, taking them presents of tea, sugar, and other provisions, besides money amounting on the whole to about £20 a year. The jury returned a verdict for the plaintiff, assessing £80 damages for the father and £40 for the mother in respect of the pecuniary loss sustained by their son's death. It was held that the jury were warranted in finding that the father had such reasonable expectation of benefit from the continuance of the son's life as to entitle him to recover damages under the statute.

It is to be observed that in each of these cases there was evidence of earning power, of actual earnings, of willingness to contribute out of their earnings, and in two of them of substantial contributions. Facts were thus supplied from which a jury might properly infer a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.

The remarks of Pollock, C.B., in *Franklin v. South Eastern R.W. Co.* (*supra*), at p. 214, illustrate this view. After pointing out that damages are not to be given as a solatium nor merely in reference to the loss of a legal right, he proceeded: "If then the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the

plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it." Having thus defined the nature of the action and the proper question for the jury, and after summarising the evidence, he went on to say what I have already noted: "We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, his son had never done anything for him. On the other hand a jury certainly ought not to make a guess in the matter, but ought to be satisfied that there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from the continuance of the life."

So in *Hetherington v. North Eastern R.W. Co.*, 9 Q.B.D. 160, an action by a father for his own benefit for the death of his son aged twenty-nine years, the evidence was that the father was fifty-nine years of age, nearly blind, and almost incapable of working by reason of injuries to his left leg and hands, that the deceased son used to contribute to his support, and five or six years before his death, the father being out of work, had assisted him pecuniarily out of his earnings. The question was whether there was sufficient evidence of pecuniary injury occasioned to the father by his son's death to sustain the action. It was held by a Divisional Court, overruling the opinion of a County Court Judge, that there was some evidence for the consideration of the jury, and that it was for them to say whether on that evidence there was a reasonable expectation of pecuniary advantage to the father from his son's life, and what, if so, the measure of such expectation was.

In England these principles have been firmly adhered to, and it is safe to say that one may search in vain for a case in which, in the absence of some evidence of the character above indicated, a jury has been instructed that they might find a verdict in favour of the plaintiff.

While, as the instances above referred to shew, it is not absolutely essential to prove the actual receipt of pecuniary assistance

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or benefit during the lifetime of the deceased, there must be evidence of such a tangible and substantial character as to satisfy a jury that, in the words of Pollock, C.B., "there has been a loss of sensible and appreciable pecuniary benefit, which might have been reasonably expected from a continuance of the life."

Capacity, ability, and willingness to assist may be inferred from the facts shewn, but it seems clear that there must be shewn to exist such a condition of things as will fairly and reasonably lead the mind to the conclusion that a loss has actually been sustained. Otherwise the jury are put in the region of conjecture, they are left to guess, and so they are more likely to punish the wrong-doer than to render the compensation the statute provides for those on whose behalf the action may be brought.

In the instances of actions arising out of the deaths of young persons there has always been an attempt on the part of the plaintiff to shew deprivation of a present actual pecuniary benefit, very slight in some cases, but still tangible, such as the performance of services in the household.

In the comparatively recent case of *Bedwell v. Golding* (1902), 18 Times L.R. 436, the action was by a father to recover damages for the death of his daughter, eleven years old. Evidence was given that she lived with her father and performed certain household services which enabled him apparently to dispense with a servant. The trial Judge directed the jury on this branch of the case that the plaintiff was only entitled to recover as damages for the loss of his daughter's services the excess value to him of those services over the estimated cost of her keep and general maintenance. The jury assessed the damages on this head at £30.

In *Clark v. London General Omnibus Co.*, reported in the first instance in (1905), 21 Times L.R. 505, and in appeal (1906), 22 Times L.R. 691, and [1906] 2 K.B. 648, the action was by a father to recover for the death of his daughter, twelve years old. On the question of damages the evidence was very similar to that in *Bedwell v. Golding* (*supra*), but there was the additional fact that the girl's schooling was costing nothing. The trial Judge ruled that there was evidence on which the jury might find that there was an excess in value of the services over the cost of main-

tenance. The jury found, however, that the plaintiff was not entitled to any damages for the loss of his daughter's services. The case went to appeal on other points, and eventually the action was dismissed, but no objection appears to have been made to the way in which the question of damages was put to the jury, nor to their finding thereon.

For a very full discussion of this case see *Jackson v. Watson*, [1909] 2 K.B. 193.

In each of these cases the matter appears to have been dealt with in accordance with the view expressed by Baron Bramwell in *Duckworth v. Johnson* (*supra*), that "if the plaintiff is compelled to give evidence of the value of the child's services and the cost of maintaining him, it might keep the matter straight and prevent injustice being done."

In our own Courts there has been an effort in the case of the death of young persons to prove some present services or assistance, with the view, no doubt, of enabling the jury or other tribunal to come to a conclusion whether or not there was a deprivation of a pecuniary benefit the continuance of which might reasonably be expected. That was done in the well-known case of *Ricketts v. Village of Markdale*, 31 O.R. 610.

The present seems to be the first case in our Courts in which it can be said that there was really no evidence demonstrating a capacity and a willingness on the part of the child to assist the parents, as shewn by his proved acts.

Here there is really nothing on which a jury is to come to a conclusion but the fact of the relationship, the age, the sex, the general health, the intelligence—promising, no doubt, but yet that of an infant—and the death.

The case is really that suggested by Barry, L.J., in *Wolfe v. Great Northern R.W. Co.*, 26 L.R. Ir. 548, at p. 570, of a father coming before the Court saying, "My child has been killed; and if it had lived I should have obtained great pecuniary benefit from its services."

I cannot but think that in a case like the present the jury can only arrive at an award of damages by a process of speculation and by mere guess-work not founded upon premises upon which they can reasonably proceed to estimate compensation in accord-

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ance with the principles on which it is to be awarded under the statute.

Support can be found for it in the holdings of the Courts in the United States, but so also can decisions to the contrary.

There are variances from Lord Campbell's Act in the legislation in many of the different States of the Union, and the decisions necessarily appear to be in conflict with the English authorities and with one another.

Indeed some of them would, I venture to think, be a rather startling surprise to the framer of the original Act and to those Judges to whom the object and intent of the legislation was a matter of personal knowledge and who placed a construction on its terms when the matter was new.

I am unable, consistently with the view I hold, to say that the verdict should stand. I think that the appeal should be allowed, but of course upon the terms upon which the defendants were granted leave to appeal.

MACLAREN, J.A., agreed with Moss, C.J.O.

Appeal dismissed.

E. B. B.

[BOYD, C.]

IN RE MILLER.

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June 10.

Will—Right to Maintenance—Second Marriage of Widow—Discretion of Executors.

A testator directed that \$40,000, part of his estate secured on mortgages, should, when his youngest son attained 21, be divided between his wife and his three children; and that his executors should manage his estate till his youngest son should attain 21, and out of the interest, and out of the proceeds of his real estate, maintain his wife and children. The testator died in 1904, and in 1908, when the eldest child was only 16, the widow married again, but continued to reside in the same house as before, it being her property:—

Held, that the widow did not, by reason of her second marriage, forfeit her right to maintenance down to the time when she would become entitled to a share of the principal secured by the mortgages.

Cook v. Noble (1886), 12 O.R. 81, distinguished.

Carr v. Living (1860), 28 Beav. 644, and *Bowden v. Laing* (1844), 14 Sim. 113, doubted.

The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children.

The executors should determine what sum would be required out of the income to be applied for the maintenance of the mother and children, having regard to the competence of the second husband, but not laying overmuch stress on that, the income being ample, and the children not to be stinted, because all formed one household.

THIS was a motion under Con. Rule 938, on behalf of Hester Ann Stratton (formerly Hester Ann Miller), the executrix of the will of Frederick Davis Miller, for the determination of the following questions arising under the will and in the course of the administration of the estate of the deceased, namely:—

(1) Does the provision for support and maintenance of “Hester Ann Miller, Gladys Adelia Miller, Frederick Samuel Miller, and Harold Hawley Miller,” continue from the date of the death of the above-named Frederick Davis Miller until the time fixed in the said will for the division of the principal, namely, “in the year 1922, or when my youngest son shall arrive at the age of 21 years,” or for what period?

(2) Does the provision for support and maintenance for Hester Ann Miller end on the occasion of her remarriage, or the provision for the support and maintenance of the children end at the time of their arrival at the age of 21 years respectively.

And for the disposition of other questions incidental thereto and arising under the said will or in the course of the administration.

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It appeared that the testator left him surviving the three children above named, Gladys, Frederick, and Harold, the eldest of whom was 16 at the time of the present motion; that, since the death of the testator, his widow, the above-named Hester Ann Stratton, had lived with her children in the residence occupied by the testator in his lifetime, which residence was the property of the widow; that the Surrogate Court Judge had made an allowance, in passing the accounts, of \$40 a month to the widow for the use of her house as a residence for herself and her children; and that her present husband was a physician practising in Napanee, possessing private means of his own; that Frederick Davis Miller died on June 23rd, 1904; that the yearly income from the estate was about \$3,000; and that Hester Ann Miller, about November 21st, 1908, married Dr. Stratton.

The will, so far as material, was as follows:—

“I give devise and bequeath all my real and personal estate, which is composed principally of mortgages on real estate and farm lands, as follows:

[Then follow certain legacies.]

“All the rest and residue of my household goods and effects I give to my wife, Hester Ann Miller.

“I give devise and bequeath unto my said wife, Hester Ann Miller, lot number twenty-three on the north side of Dundas street, in the said town of Napanee.

“Subject to the said gift to my said wife, I give devise and bequeath all my real estate that I shall be possessed of or entitled to at the time of my death unto my two sons, Frederick Samuel Miller and Harold Hawley Miller, share and share alike, but subject to the provisions hereinafter made. It is my will that if either of my said sons shall die before the year 1922, in which my youngest son will arrive at the age of twenty-one years, I give devise and bequeath all of my said real estate to whichever son shall survive. And I also give to my said sons the personal property on the said real estate, to remain upon the said real estate and to go with the said real estate in the same manner as the said real estate.

“I direct that forty thousand dollars, principally in mortgages, shall be kept in mortgages on real estate by my executors hereinafter named, on good security, and that in the year 1922

or when my youngest son shall arrive at the age of twenty-one years that it shall be divided equally between my said wife, Hester Ann Miller, and my three children, Gladys Adelia Miller, Frederick Samuel Miller, and Harold Hawley Miller, share and share alike, but should any of the said devisees die before the said division, then it is my will that the said forty thousand dollars be divided equally between those surviving at the time of the division.

"All the rest and residue of my personal estate not hereinbefore disposed of I direct my executors to sell, and the proceeds thereof to be added to the principal money of my estate. I direct that my executors hereinafter named shall manage my said estate until the year 1922 or when my youngest son shall arrive at the age of twenty-one years.

"I direct that my executors shall, out of the interest received from said mortgages and out of the proceeds from my said real estate, support and maintain my said wife and children in the manner and style in which they have heretofore been accustomed, and any proceeds at the end of each year remaining after the support and maintenance of my said wife and children shall be added to the principal money of my estate. I desire that my executors shall keep the moneys belonging to my estate not loaned out on mortgages in two accounts in some chartered bank, the principal to be kept in the savings department and the interest and rents from my said real estate in a general account, and at the end of each year to transmit from the general account to the savings department account, after paying all necessary expenses for the current year for the support and maintenance of my said wife and children, all money except the sum of five hundred dollars. . . .

"The said gifts to my said wife to be in lieu of dower or any claim she might have on my real estate. . . .

"And I appoint my cousin, Frederick Fraser Miller, of the said town of Napanee, civil engineer, and my said wife, Hester Ann Miller, to be executor and executrix of this my will, and I hereby revoke all former or other wills and declare this to be my last will and testament. But in the event of the death of my said wife before the said division in 1922, then said Frederick Fraser Miller shall be sole executor thereafter."

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The motion was argued before BOYD, C., in the Weekly Court, on June 9th, 1909.

C. J. Holman, K.C., for the executrix.

J. R. Meredith, for the infants.

The following authorities were referred to: *Dawson v. Fraser* (1889), 18 O.R. 496; *In re Booth, Booth v. Booth*, [1894] 2 Ch. 282; *Cook v. Noble* (1886), 12 O.R. 81; *Soames v. Martin* (1839), 10 Sim. 287; *Wilkins v. Jodrell* (1879), 13 Ch. D. 564; *Williams v. Papworth*, [1900] A.C. 563; *Frewen v. Hamilton* (1877), 47 L.J. Ch. 391; *Newsom's Trusts* (1878), 1 L.R. Ir. 373; *Castle v. Castle* (1857), 1 DeG. & J. 352; *Carr v. Living* (1860), 28 Beav. 644; *Bowden v. Laing* (1844), 14 Sim. 113; *In re Robertson's Trust* (1858), 6 W.R. 405; Armour's ed. of Theobald on Wills, p. 469f; *Rippon v. Norton* (1839), 2 Beav. 63; Bouvier's Law Dictionary, *sub voc.* "Forisfamiliaration."

June 10. BOYD, C.:—Bequest of property to trustees upon trust to permit the widow to receive the profits and maintain herself and her family. She eloped with a married man, and it was held she had forfeited the right to administer the trust, and the Court directed a sufficient sum out of the profits to be set apart for the support of the children, and she might have maintenance, and no more, out of what was left: *Castle v. Castle*, 1 DeG. & J. 352. This was followed by *In re G.*, [1899] 1 Ch. 719, where the bequest was to the wife during widowhood of a fund, she maintaining, educating, and bringing up the children. The wife, while duly educating and maintaining the children, lived in adultery with a married man in the house she had provided for the children. Held, that the Court must administer the fund for the benefit of the children, who were to be taken from her, but that, as between her and the children, she should receive so much of the income, having regard to the social position of the parties and the amount of available income, as was adequate to her own personal maintenance and support.

It would be an odd conclusion to hold, in the absence of a clause in the will limiting the maintenance of the wife (widow) *durante viduitate*, that, though she lives in adultery, the maintenance continues, yet that it would be forfeited if she contracted a lawful second alliance. No doubt, when there is a second marriage,

it may be said she will be or ought to be maintained by her husband, but does that obliterate the direction of the will that the wife (naming her) is to have maintenance during the minority of the children or for a stated period? Does it affect anything except the quantum?

I might, perhaps, be bound by the opinion of Mr. Justice Proudfoot in *Cook v. Noble*, 12 O.R. 81, 93, holding that the provision for her support ceases when she passes into second nuptials, if the language of the will were the same substantially as in that case. But here I find a very important provision pointing the other way. The testator directs setting apart \$40,000 on mortgage, which is to be divided in 1922, when the youngest child comes of age, and then to be divided equally between his wife, Hester Ann Miller, and three children named, share and share alike. The executors are to manage the estate till 1922, and out of the interest of the mortgage to support and maintain the wife and children in the manner and style in which they have heretofore been accustomed, and any proceeds (*i.e.*, balance) remaining at the end of each year, after providing for maintenance, is to be added to the principal money of the estate.

This contemplates and provides that the widow has a vested interest in a share of the mortgage, if she is alive at the period of distribution in 1922, and, as a consequence, that the beneficial enjoyment of its produce meanwhile, as far as necessary for maintenance, shall go to her, even though she cease to be a widow and marries again. That is clearly so as to the principal money, and why not also as to the accessory, the interest, so far as needed for maintenance for herself and the children, who all live in one home with the second husband?

I think the executors are to exercise their discretion in making an allotment of how much should go for maintenance. The lines on which they are to act were considered in *In re Shafer* (1907), 15 O.L.R. 266. The executors should determine what sum is required out of the interest to be applied for the maintenance of the mother and children, having regard to the competence of the second husband, but not laying overmuch stress on that, as the income is ample to meet the call in this direction, and the children need not be stinted, because all form one household. I may further observe that I doubt the value of the cases

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of *Carr v. Living* and *Bowden v. Laing*, on which the Vice-Chancellor proceeds, as regarded in the light of later decisions. The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children. Those married may share if the need exists: *Re Booth*, *Booth v. Booth*, [1894] 2 Ch. 282. *Cook v. Noble* was decided in 1886. *Frewen v. Hamilton*, 47 L.J. Ch. 391, decided in 1877, was not cited in *Cook v. Noble*.

There is the further distinction between the cases cited in *Cook v. Noble* and the present case, which, though subtle, is marked in the decisions, namely, in those there was an absence of any indication as to the duration of the time of maintenance, while here the testator has given it for a stated period.

What I decide is that the wife does not forfeit her right to a share of the fund provided for her maintenance down to 1922 because she has formed a second marriage.

Costs out of the estate.

A. H. F. L.

[IN THE COURT OF APPEAL.]

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REX v. BLYTHE.

June 29.
Sept. 24.
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Sept. 29.

Criminal Law—Conviction for Murder—Application for Stated Case—8 & 9 Edw. VII. ch. 9 (D.)—Retroactive Operation—Insanity—Absence of Malice—Intention—Evidence—Culpable Homicide—Wife-beating—Unlawful Act—Act Likely to Cause Death—Refusal to Delay Trial to Procure Evidence—Question of Law—Misdirection—Definition of “Murder” and “Manslaughter”—Provocation—Cooling Time—Criminal Code, secs. 259, 1014—Intoxication—Appreciation of Nature and Result of Acts—New Trial.

The prisoner was tried upon an indictment for murdering his wife by repeated blows with an iron poker, convicted, and sentenced to be hanged on the 13th May, 1909, but was reprieved by the Governor-General till the 17th June. No objection was made to the charge of the Judge at the trial; but on the 15th June counsel for the prisoner applied to the Judge to reserve a case for the Court of Appeal under 8 & 9 Edw. VII. ch. 9 (D.), which came into force on the 19th May, 1909, being after the trial, and after the day originally fixed for the execution. The Judge nevertheless consented to hear the application, as it was upon a matter of procedure.

It was urged on behalf of the prisoner that the evidence did not support a verdict of murder, as the prisoner did not intend to kill the deceased,

but it was admitted that, subject to the defence of insanity, the act of the accused was culpable homicide:—

Held, by the trial Judge, upon an application to him to state a case for the consideration of the Court of Appeal, that the jury were properly charged that the prisoner's act could only be for an unlawful object, and that if it was an act which he ought to have known would be likely to cause death, the crime was murder, under sec. 259 of the Code. Whether the act was of such a character was a question for the jury, and could not be withdrawn from them.

It was also urged that a reserved case should be granted on the ground that effect had not been given to an application by the prisoner to delay the trial for two months so as to enable him to produce evidence of insanity:—

Held, that this, not being a question of law, could not be the subject of a reserved case under sec. 1014 of the Code, and that the Act 8 & 9 Edw. VII. ch. 9 was not more comprehensive as to the nature of the questions to be reserved.

Held, also, that the jury were properly charged that when one person has killed another, the law presumes that this is murder unless the contrary is shewn.

Re v. *Greenacre* (1837), 8 C. & P. 35, followed.

It was not misdirection to charge the jury that, had one blow only been given, the jury might have found a verdict of manslaughter on the ground of provocation, but not where the blows were repeated after there had been time for the prisoner's passion to cool.

A subsequent application on behalf of the prisoner to the trial Judge to state a case as to whether he should not have charged the jury that they should consider the prisoner's state of intoxication in regard to his appreciation of the nature and result of his acts, was refused; but, on application to the Court of Appeal, a new trial was ordered upon this ground.

APPLICATION by the prisoner, under the Dominion statute 8 & 9 Edw. VII. ch. 9,* to the trial Judge, to reserve a case for the Court of Appeal. The facts are stated in the judgment.

The motion was heard before the trial Judge, RIDDELL, J., on the 15th June, 1909.

T. C. Robinette, K.C., for the prisoner.

June 29. RIDDELL, J.:—On the 9th February of the present year Walter Blythe was tried before me with a jury of the county of York upon a charge of murdering his wife by repeated blows with an iron poker, and convicted.

At the close of my charge, I asked counsel if there were any objections, and counsel for the prisoner answered that there was none.

*8 & 9 Edw. VII. ch. 9, sec. 2 (schedule) repeals sub-sec. 3 of sec. 1014 of the Criminal Code, and substitutes the following sub-section:—"3. Either the prosecutor or the accused may, during or after the trial, either orally or in writing, apply to the Court to reserve any such question as aforesaid, and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection."

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Upon the following morning, as I understood that an application might be made for a reserved case, I stated to counsel that since the decision in *Ead v. The King* (1908), 40 S.C.R. 272, it seemed to me that I could not listen to an application for such a case by counsel, but that I invited him as *amicus curiæ* to suggest to me at his leisure any ground upon which it could fairly be urged that a reserved case should be granted.

I was subsequently informed that it was not intended to submit any grounds, but that executive clemency would be asked for. No application was in fact made to me until the 15th June; and no grounds were suggested upon which a reserved case should be granted.

I sentenced the prisoner to be hanged on the 13th May, giving this somewhat long time that evidence might be obtained (if there were any such) from England as to his alleged weakness of mind. This might be used upon the application for executive clemency.

The prisoner was reprieved by the Governor-General till the 17th June.

Upon the evening of the 15th June counsel for the prisoner applied to me under the new statute 8 & 9 Edw. VII. ch. 9, sec. 1014(3)(D.), to reserve a case for the Court of Appeal. This statute came in force on the 19th May, 1909, and consequently after the trial, and after the day originally fixed for the execution; but it is upon a matter of procedure, and consequently I did not refuse to hear the application.

The grounds urged appear in a notice of appeal to the Court of Appeal. I had more than once read all the proceedings at the trial, and had not seen any ground for reserving a case; and nothing said upon the application changed my mind. I refused the application, stating that, if desired, I should give reasons in writing. This has been asked.

Before setting out these grounds, I would say that there was no doubt that the prisoner killed his wife, and the defence was twofold, namely, insanity and absence of malice—chiefly insanity.

The grounds of the application are:—

1. The evidence did not support a verdict of murder, as it is contended that the prisoner did not intend to kill his victim.

The law does not require that the accused shall actively intend to kill or desire to kill. Section 259 of the Code says: "Culpable homicide is murder . . . if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one." Subject to the defence of insanity, which is not now pressed, it was admitted that the act of the accused was culpable homicide. I told the jury that continued beating of a woman with a poker could only be for an unlawful object, and if what the accused did was an act which he ought to have known to be likely to cause death, the crime was murder. Whether the act was of such a character was a question for the jury—I could not withdraw it from them—nor, as I think, would the Court say as a matter of law that the evidence could not support the verdict.

2. Evidence of Constable Hobbs of complaints made by the deceased to him of previous beatings was allowed in.

The tragedy took place on the 3rd January, 1909. Hobbs testified that on the 11th December he went to the house of one Walker, a neighbour of the Blythes, and found Mrs. Blythe crying; he went to her home—the prisoner came to the door—Hobbs asked him what the trouble was, and the prisoner said she had got mad and went away because he did not that day bring her some things from town she had sent for. Hobbs then asked where she was—the prisoner said he did not know, that she went away of her own accord, and she could come back; whereupon Hobbs himself went to Walker's and brought her back and said to the prisoner that if he ever heard tell of him abusing her he would put him where he would not; whereupon the prisoner said that he had not been abusing her.

No evidence was tendered and none admitted of any complaint made by Mrs. Blythe to the constable or to any other person; and this objection is based upon a misapprehension.

3. Effect was not given to an application by the prisoner to delay the trial for two months so as to enable him to produce evidence of insanity.

This is not, as I understand it, a question of law; and questions of law are the only questions which can be reserved under

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sec. 1014 of the Code—and the new enactment is not more comprehensive as to the nature of the questions to be reserved.

But in any case all that was suggested was that it was possible that, upon making inquiry in England, something might be found which would lend colour to the theory of insanity. Nothing was indicated which could shew any probability or possibility of procuring evidence which would tend to shew that the prisoner was, at the time of committing the offence, labouring under any disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act or of knowing that the act was wrong. That is the only kind of insanity which is of importance: sec. 19 of the Code.

The prisoner had been examined by several medical men, and it did not seem that any evidence such as it was indicated it might be possible to get would be of any advantage upon the inquiry.

As to the complaint that the trial took place within a few weeks of the tragedy, it is of no small importance that law should be administered promptly. No doubt, all reasonable time should be given to the prisoner to prepare for his defence; but, subject to this, I am of the opinion that the sooner an alleged criminal receives his trial in open court the better. Much of the lawlessness which prevails in some jurisdictions is undoubtedly due to the law's delays; and I adhere to what I said in *Rex v. Swyryda* (1909), 13 O.W.R. 468, at p. 475.

4. A misdirection as to the definition of murder and manslaughter.

No objection was taken to the charge, as, of course, would have been the case had counsel thought a mistake had been made in the law as laid down to the jury.

The charge began (upon this point) by dividing all homicide into culpable or criminal and non-culpable or non-criminal homicide, following the Code, secs. 250, 252. Then culpable homicide was divided into murder and manslaughter, and the jury were told that when one person has killed another the law presumes that this is murder unless the contrary is shewn. Such is the law, as is shewn by *Rex v. Greenacre* (1837), 8 C. & P. 35. Tindal, C.J., says (p.

42): "Where it appears that one person's death has been occasioned by the hand of another, it behoves that other to shew from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder." It was right, therefore, that the jury should be charged as they were. After a definition and discussion of malice not necessary to be here set out, the definition given by the Code was laid before the jury. I followed the definition in sec. 259 (a), (d), word for word, and that is the definition by which our Courts must be bound. Applying the definition in sec. 259(d) set out above, I charged the jury that the act of Blythe beating his wife with a poker, as he did, was unlawful—and I adhere to that opinion. Then it was shewn what provocation would reduce what would otherwise have been murder to manslaughter, and in that I followed the Code exactly. It was in drawing the attention of the jury to the fact that the law does not reduce what would otherwise have been murder to manslaughter in the case of provocation, unless the offender acts upon it on the sudden and before there has been time for his passion to cool, that I said that, had one blow only been given, the jury might have found a verdict of manslaughter on the ground of provocation, but not where the blows were repeated after there had been time for his passion to cool.

And the whole matter was left to the jury, whether the act was one which he ought to have known would be likely to kill, though nobody contended that he had it in his mind to kill; and the jury were charged that if what he did was an act which he ought to have known would be likely to kill, the verdict should be murder, and not manslaughter.

I can see no reason for reserving a case—and that is especially so in view of the time at which the application is made. It was open to the prisoner to apply to the Minister of Justice under sec. 1022, and if the Minister of Justice entertained a doubt whether the prisoner should have been convicted, he might have directed a new trial. No doubt, the Minister of Justice can do this without an application for that purpose, and simply upon an application for clemency—and, no doubt, the Minister of Justice has fully considered this phase of the case (as petitions for

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clemency were sent in), and has entertained no doubt of the righteousness of the conviction. I entertain none; and, retaining the views as to the administration of criminal justice which I expressed in *Rex v. Swyryda*, 13 O.W.R. at p. 475, I think I cannot accede to the request.

In my humble view, in the administration of criminal justice by the Courts, there is no room for weak sentimentality or even sympathy.

On the 22nd September, 1909 (the prisoner having been again reprieved), *Robinette*, K.C., for the prisoner, moved before the Court of Appeal (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.), for leave to appeal or for an order directing the trial Judge to state a case for the opinion of the Court, upon the grounds considered by the trial Judge, and upon the further ground that the trial Judge should have specifically instructed the jury that they should consider the prisoner's state of intoxication, and that if they thought his state of intoxication was such as to prevent him from appreciating the nature and result of his acts, they should not convict of murder but of manslaughter.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown.

September 24. THE COURT gave judgment refusing to direct that a case should be stated upon the grounds previously urged before the trial Judge; but suggested that an application should be made to the trial Judge to state a case upon the new ground.

Upon the same day *Robinette*, K.C., applied to RIDDELL, J., in Chambers, to state a case.

September 25. RIDDELL, J.:—Upon an appeal taken from my refusal to state a case for the Court of Appeal, I understand that the grounds upon which I had been asked to state a case were not pressed, or if pressed not successful, but that a new ground was urged upon the Court of Appeal. As the Court thought they had no jurisdiction to entertain that application without a refusal upon my part to state a case upon that ground, I am now applied to to state a case accordingly.

I here subjoin the application:—

“What I desire your Lordship should state for the opinion

of the Court of Appeal is: 'Should I have specifically instructed the jury that they should consider his state of intoxication, and that, if they thought his state of intoxication was such as to prevent him from appreciating the nature and result of his acts, they should not convict of murder but of manslaughter.' "

Upon the trial the defence most relied upon was insanity; no complaint is now made that anything like insanity was made out or that the jury were not accurately charged upon that issue. There was no pretence that the prisoner had got himself under the influence of intoxicants to such an extent as to prevent him from fully appreciating the nature and probable result of his acts. It is true that some five or six hours after the killing the neighbours found him partially under the influence of cider, but he is then continuing to drink cider. He at no time says he was affected by cider or any intoxicant at the time of the occurrence; although he gives an account to Walker, Miss Walker, Hobbs, Patterson, Dr. MacMahon, and Dr. Sisley, in which he says that he drank cider, he does not pretend to say that it had any such effect upon him as counsel now (for the first time) suggests it may have had. On the contrary, he resented the statement by Patterson that he "should have left the drink alone," and at once answered, "Now don't insinuate."

No one having at the trial made any pretence that the mind of the prisoner was affected by intoxication in the direction indicated, and there being no evidence in that direction, it would have been idle for me to charge the jury upon what is of course undoubted law in the case of a prisoner proved to have been drunk at the time of committing the offence, and to tell them that the presumption that a man is taken to intend the natural consequences of his acts is rebutted, in the case of a man who is drunk, by shewing his mind to have been so affected by the drink that he was incapable of knowing that what he was doing was dangerous. No one doubts the law; but the law stated does not apply to the present case. "When a Judge sums up to a jury he must not be taken to be inditing a treatise on the law:" *Rex v. Meade*, [1909] 1 K.B. 895, at p. 898.

The fact alleged that the prisoner had taken intoxicants was urged in the view that, being partially unsound, the mind of the

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prisoner became more readily wholly unsound from his drinking—the question of soundness or unsoundness of mind was fully dealt with in the charge, and no objection of any kind was taken at the trial, counsel expressly stating that there was no objection.

The law is beyond question, also, that, if the jury entertain a reasonable doubt that the prisoner committed the act, they should find the prisoner “not guilty:” it would in this case, in my humble judgment, have been as necessary that I should so charge them—though there was no pretence that he had not committed the act—as that I should charge them upon the law applicable if it had been proved that he was drunk. No such case was made or alleged; nothing of the kind has been even suggested till now, after months of consideration and two reprieves.

The present is an afterthought. Whether it can be called a “question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto” (Criminal Code, sec. 1014), I do not pass upon, as I must refuse the application upon the merits.

On the 28th September, 1909, *Robinette*, K.C., for the prisoner, moved before the Court of Appeal (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.), for leave to appeal or for a direction to the trial Judge to state a case upon the point above referred to. It should have been left to the jury to say whether the prisoner was in such a condition that he should have the intention of causing death. There was ample evidence of intoxication. It was for the jury to say whether his intoxication reduced his crime from murder to manslaughter. I refer to Archbold’s Criminal Pleading, 23rd ed., p. 29; Criminal Code, sec. 259; *Regina v. Doherty* (1887), 16 Cox C.C. 306; *Regina v. Monkhouse* (1849), 4 Cox C.C. 55; Russell on Crimes, 6th ed., vol. 1, p. 144; *Regina v. Doody* (1854), 6 Cox C.C. 463; *Regina v. Cruse* (1838), 8 C. & P. 541; *Regina v. Moore* (1852), 3 C. & K. 319; *Rex v. Meade*, [1909] 1 K.B. 895. If the Crown consents, and the Court sees fit, this may be taken as an argument upon a case stated.

J. R. Cartwright, K.C., for the Crown. The statements in the evidence as to the intoxication of the prisoner are hypothetical.

It is clear law that the only duty of the Judge is to direct the jury as to the issues raised. Drunkenness was not an issue at the trial. There was no proof of drunkenness; there must be some evidence to raise an issue. I am content to leave the matter as if argued on a stated case. I refer to *Rex v. Meade*, [1909] 1 K.B. 895; *The King v. Barrett* (1908), 14 Can. Crim. Cas. 464.

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September 29. The judgment of the Court was delivered by Moss, C.J.O. (oral):—We have now considered the case with care, and, I think I may say, with due regard to the gravity of the issues involved, and the importance of the matter to the prisoner, and, after deliberation, we have come to the conclusion, though not without some hesitation on the part of some of the members of the Court, that, looking at the whole case, and regarding the evidence as it went to the jury, a case should be stated upon this question. This result has been reached after as full consideration of the matter as if a stated case was before us.

That being the conclusion, it will follow, from the understanding that was spoken of yesterday at the conclusion of the argument, that the present conviction will be set aside, and a new trial will be granted to the prisoner; and, that being the view the Court has taken of the case, we deem it proper and right, as much in the interest of the prisoner as in other interests, that we should not comment upon the evidence that was before the jury or upon the way in which the case was finally presented to the jury.

It may be said, however, that there can be no reason to suppose for a moment from the case as it presents itself to us, that if the learned trial Judge had been requested to charge the jury in the way in which it is now stated he should have done, he would have refused to do so.

It would have been as obvious to him as it now appears to be to every one concerned, that the alleged condition of intoxication and the extent of that intoxication were proper to be considered by the jury as bearing upon the question of intent. And, no doubt, if his attention had been drawn to it, he would have directed the jury that the presumption that a man intends the natural consequences of his act may be rebutted in the case of a man who is drunk, by shewing that his mind was so affected by

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the drink he had taken that he was incapable of knowing that what he was doing was dangerous, that it was likely to inflict serious injury; and they would have been asked to pass upon that, having regard to the evidence before them.

Those in charge of the case seemed to be directing their minds to other views of the case, and that view of it was overlooked, or at all events not thought of sufficiently to determine them to ask that it should be presented among the other issues before the jury. The result seems to have been that perhaps the prisoner has not had his case presented to the jury as fully to his advantage as it would have been had the matter been presented on his behalf in that way.

Without entering upon the case further, having in view the new trial, it is only necessary to repeat that this result has been reached after full consideration of the matter, treating it as if a stated case was now before us.

G. G.

[IN THE COURT OF APPEAL.]

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Sept. 20.

RE TORONTO R.W. CO. AND CITY OF TORONTO.

Street Railway—Contract with Municipal Corporation—Construction—Decision of Judicial Committee—55 Vict. ch. 99 (O.)—8 Edw. VII. ch. 112 (O.)

Upon appeal from a decision or order of the Ontario Railway and Municipal Board upon the hearing of an application to it involving the same question as that dealt with by the Judicial Committee of the Privy Council in *City of Toronto v. Toronto R.W. Co.*, [1907] A.C. 315:—

Held, that, inasmuch as it could not be said that it manifestly appeared that the decision of the Judicial Committee was founded solely upon the effect of the provisions of the Act 55 Vict. ch. 99 (O.), and not, to some extent at least, upon the language of the agreement validated and confirmed by that Act, the only course open was to affirm the order of the Railway and Municipal Board, notwithstanding sec. 1 of the Act 8 Edw. VII. ch. 112 (O.)

AN appeal by the city corporation (by leave of the Court of Appeal) from a decision or order of the Ontario Railway and Municipal Board, dated the 8th December, 1908, made upon the application of the railway company.

The order was as follows:—

"1. The Board finds and declares that the applicant has the right to construct its railway upon Adelaide street, from Jarvis street to Bathurst street; upon Bay street, from Front street to Queen street; upon University avenue, from Queen street to College street; upon Richmond street, from Victoria street to Church street; and upon Wellington street, from Church street to York street: all of the said streets being within the boundaries of the city of Toronto as constituted at the date of the agreement between the applicant and the respondent, dated September 1st, 1891.

"2. And the Board further finds that the respondent has denied the right of the applicant hereinbefore declared, and has prevented the applicant from constructing its railway upon the said streets, and has thereby committed a breach of the said agreement.

"3. And the Board orders that the respondent, its officers, servants, and agents, refrain and they are hereby enjoined from doing any acts to prevent the applicant from constructing lines of railway upon the said streets as set forth on the plans filed as exhibits at the trial hereof.

"4. And the Board further orders that the respondent pay the sum of \$50 for stamps required for this order; and makes no further order as to costs."

The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., on the 22nd April, 1909.

W. E. Middleton, K.C., and *W. Johnston*, for the city corporation, the appellants. At the time of the making of the agreement between the city and the company, the statute regulating street railways was R.S.O. 1887, ch. 171, and the parties must have had sec. 4 of that Act in view. Unless that section is read into the agreement, it is incomplete and in many respects unintelligible. The intention of the agreement was that the city corporation might require the company to lay down lines on certain streets; and, if the latter refused to do so, they would lose the monopoly which they would otherwise enjoy. It is open to the Court to construe the agreement in this way, notwithstanding the judgment of the Privy Council in *City of Toronto v. Toronto R.W. Co.*, [1907] A.C. 315. The argument of counsel for the company in

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that case was based to a great extent upon the statute of 55 Vict. ch. 99 (O.), by which, however, it was only intended to validate the agreement which forms a schedule to it, and to sanction the extension of the period for which it was to run from twenty to thirty years. The interpretation contended for by the respondents would render nugatory any proposition to allow competing lines to be built. The judgment of the Privy Council deals mainly with the validating Act of 55 Vict., and, in view of the recent statute of 8 Edw. VII. ch. 112, the Court has to determine the true construction of the agreement, apart from the validating Act, and having reference to R.S.O. 1887, ch. 171, which is the governing enactment in this case.

W. Nesbitt, K.C., and *D. L. McCarthy*, K.C., for the respondents, the railway company. Weight should not be attached to arguments addressed to the Courts in a former case, which were not adopted by the judgments delivered therein. The position contended for by the company is in line with what has been the actual practice for many years. The agreement between the parties is not governed by R.S.O. 1887, ch. 171, but is an agreement with certain specified individuals, and a special Act was afterwards passed. A by-law was passed confirming the agreement, to the interpretation of which the question comes back. The alternative right given to the city corporation was a derogation, and shewed in what cases the company would be considered as abandoning a right which they originally possessed. The respondents rely upon the judgment of the Privy Council, already cited, and refer especially to the supplementary judgment in that case in which it was stated that the underlying right under the agreement was the exclusive right of the company, and that the provisions of secs. 14 and 17 of this agreement must be looked upon merely as a modification of that right under certain circumstances.

Middleton, in reply.

September 20. The judgment of the Court was delivered by Moss, C.J.O.:—For the sake of brevity the railway company will hereafter be spoken of as “the company” and the corporation of the city as “the corporation.”

The order appealed from was pronounced after hearing the parties upon an application made by the company, upon notice

to the corporation, complaining that the corporation engineer refused to approve of plans of a line or lines of railway which the company proposed to construct upon and along certain streets, and praying for an order that the engineer be required to state his objections, if any, and that, in the absence of valid objections, the plans be taken as approved, and the corporation restrained from interfering with the construction of the railway in accordance with the plans.

The formal order issued by the Board finds and declares: (1) that the company have the right to construct their railway upon certain streets therein specified; (2) that the corporation denied the right of the company and prevented the company from constructing their railway upon the said streets, and thereby committed a breach of the agreement between the company and the corporation; (3) that the corporation be enjoined from doing any acts to prevent the applicants from constructing lines of railway upon the said streets as set forth in the plans.

The question of law (there being no appeal upon any question of fact—6 Edw. VII. ch. 31, secs. 41 (3) and 43 (2)) in respect of which leave to appeal was granted, is in all substantial respects the same as that dealt with by the Judicial Committee of the Privy Council in the appeals of *City of Toronto v. Toronto R.W. Co.* and *Toronto R.W. Co. v. City of Toronto*, [1907] A.C. 315.

The questions in these appeals related to the respective rights of the corporation and the company to the management and control of the streets, having regard to the terms of the agreement. One matter in dispute was, in which of the two bodies, the corporation or the company, was vested the right to determine, decide upon, and direct what new lines should be established and laid down and tracks and services extended thereon by the company on streets in the city as existing at the date of the agreement.

For reasons stated in the judgments delivered, this Court (10 O.L.R. 657) and the majority of the Judges of the Supreme Court (37 S.C.R. 430) sitting in appeal from this Court were of the opinion that it was for the corporation and not for the company to determine, decide upon, and direct, and in the manner prescribed by clause 14 of the conditions of the agreement, what new lines should be established and laid, and tracks and services extended thereon, in the streets.

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But this opinion did not find favour with their Lordships of the Judicial Committee, who decided and advised His Majesty that, subject to clauses 14 and 17 of the conditions, it was for the company, and not for the city engineer with the approval of the city council, to determine what new lines should be laid down on streets within the city as existing at the date of the agreement and what routes should be adopted by the company. These conclusions were embodied in an order in council bearing date the 7th May, 1907.

The streets in question in the present proceeding are within the city as existing at the date of the agreement; and the decision of the Judicial Committee and the order in council based thereon, it is scarcely necessary to say, are binding upon all concerned, unless they are deprived of their effect by the enactment of sec. 1 of the Act 8 Edw. VII. ch. 112, which confessedly was passed by the Legislature, upon the petition of the corporation, in view of the decision of the Judicial Committee.

The section reads: "1. Notwithstanding anything contained in the Act passed in the fifty-fifth year of the reign of Her late Majesty Queen Victoria, and chaptered 99, and intituled An Act to incorporate the Toronto Railway Company and to confirm the agreement between the Corporation of the City of Toronto and George W. Kiely, William Mackenzie, Henry A. Everett, and Chauncey C. Woodworth; and notwithstanding any judicial decision interpreting the effect of the said Act and the said agreement, it is hereby declared that it is and always has been the true meaning and intent of the said Act that the rights retained by and secured to the Corporation of the City of Toronto by the said agreement as to the control and management of the streets of the said City, and as to establishing and laying down new lines of railway, and as to extending the street car service upon the streets of the said City, as may be from time to time recommended by the City Engineer, and approved by the City Council, have not been and are not affected by the said Act, but said rights remain and are as set out in the said agreement scheduled to the said Act."

It is urged on behalf of the corporation that it manifestly appears from their Lordships' reasons that their opinion as to the true construction and meaning of the agreement was based

entirely upon their reading of the Act 55 Vict. ch. 99, and especially of the 4th section. And it is contended that the result is, that this Court is now at liberty to revert to the view entertained by it and the majority of the Judges of the Supreme Court.

In other words, that, having already interpreted the agreement, all that remains for this Court is to interpret their Lordships' reasons.

The Railway and Municipal Board, in dealing with the questions before it, treated the Act 55 Vict. ch. 99 as a mere incorporating and invalidating Act, and proceeded to try the rights of the parties as they existed under the agreement alone, unaffected except as to validation by the Act; and, having regard to the plain object and intent of that Act, as well as to the declaration of sec. 1 of 8 Edw. VII. ch. 112, there can be no question as to the propriety of dealing with the agreement in that light. The conclusion of the Board is in harmony with what has been determined by the Judicial Committee. Is it so manifestly apparent that the decision of their Lordships of the Judicial Committee as to the true construction and meaning of the agreement was founded so exclusively upon their reading of the Act 55 Vict. ch. 99, that their conclusion would have been different if the Act had been left out of their consideration?

Unless that be so, their Lordships' actual decision and the declarations of the order in council must prevail over any opinions we may entertain.

To endeavour to interpret an individual's language and expressions explanatory of his reasons for arriving at conclusions must always be a difficult and unsatisfactory undertaking—especially so when the inquiry is directed to ascertaining the dominating considerations. Unless the language is so explicit as to admit of no reasonable question, its explanation is better left to the individual who used it if he is still available.

After careful perusal and consideration of their Lordships' reasons, I for one am unable to conclude that their opinion as expressed as to the true meaning of the agreement was not, to some extent at least, formed upon a consideration of the language and terms of the agreement itself. Their Lordships refer to the 1st and 4th sections of the Act 55 Vict. ch. 99, but I do not find it possible, having regard to other portions of the reasons, to say

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that their Lordships' view was founded solely upon them, or that they would not have come to the same conclusion without regard to these sections except in so far as they are incorporating and validating sections.

And not being able to bring my mind to that conclusion, nothing remains but to follow the decision embodied in the order in council.

The appeal must therefore be dismissed with costs.

E. B. B.

[IN CHAMBERS.]

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Aug. 24.

RE VANDYKE AND VILLAGE OF GRIMSBY.

Municipal Corporations—Local Option By-law—Repeal—Ineffective Proceedings—Submission of New By-law—Time-limit—6 Edw. VII. ch. 47, sec. 24, sub-sec. 6 (O.)

A village council passed a local option by-law in 1906; a petition for its repeal was presented in 1908; and proceedings were taken for the submission of a repealing by-law to the electors in 1909. The electors voted upon the by-law, but the number in favour of it was insufficient to authorise the council to pass it. The proceedings were in fact invalid because the voting took place more than five weeks after the first publication of the by-law:—

Held, that the ineffective proceedings taken in respect of this repealing by-law were not a bar to the submission of another repealing by-law before the year 1912, notwithstanding the provision of 6 Edw. VII. ch. 47, sec. 24 (sub-sec. 6 of sec. 141 of R.S.O. 1897, ch. 245), that "in case such repealing by-law is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third annual municipal election thereafter."

MOTION by one Vandyke for an order declaring invalid the proceedings taken to submit a repealing local option by-law, and directing the council to submit another repealing by-law to the electors at the next annual election for members of the municipal council. The facts are stated in the judgment.

The motion was heard by MULLOCK, C.J.Ex.D., in Chambers, on the 28th May, 1909.

G. Lynch-Staunton, K.C., for the applicant.

J. M. Ferguson, for the village corporation.

W. E. Raney, K.C., for Joseph Grasley and John Muir, electors.

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August 24. MULOCK, C.J.:—Mr. Ferguson, for the council, stated that they did not intend to take part in the motion. Thereupon Mr. Raney, for Joseph Grasley and John Muir, electors, desired to be allowed to intervene, he undertaking to abide by any order as to costs that the Court might see fit to make. On these terms I acceded to Mr. Raney's request, and he was heard in opposition to the motion.

In 1906 the council, under the provisions of sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, passed a local option by-law—No. 209—which is still in force. On the 29th October, 1908, under 6 Edw. VII. ch. 47, sec. 24, sub-sec. 6,* a petition was filed with the clerk of the council praying for the submission to the electors at the then next municipal election of a by-law to repeal by-law No. 209, and thereupon the council introduced such repealing by-law, read the same a first and second time, took certain steps for submitting the by-law to the electors, and purported to hold an election thereon, but the number of electors voting in favour of the repealing by-law was insufficient to authorise the council to finally pass it, and no further action in respect of it has been taken by the council.

On the 19th April, 1909, a petition, signed by 143 ratepayers of the village, was presented to the council, asking them to submit a new repealing by-law to the electors upon the day fixed for the annual election of members of the council in January, 1910, but the council, on the same day passed a resolution unanimously resolving that the petition "be not granted, as it is the opinion of this council that its members have no jurisdiction in the matter."

Mr. Ferguson stated that the explanation of the council's attitude was that they were of opinion that, a repealing by-law having been submitted to the electors in January, 1909, and defeated, it was not competent to the council to submit another repealing by-law until the third municipal election after that of 1909; but that, if the Court was of opinion that the repealing by-law of

*By sec. 24, sub-sec. 2 of sec. 141 of R.S.O. 1897, ch. 245, is repealed, a new sub-sec. 2 substituted, and sub-secs. 3, 4, 5, 6 and 7 added to sec. 141.

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1908—if it had received the required statutory majority and been passed—would, nevertheless, have been invalid, because of any circumstances in respect of its passage, he undertook on behalf of the council that they would submit a new repealing by-law to the electors at the next municipal election, and that his undertaking might be regarded as equivalent to a mandamus.

Dealing then with the applicant's motion—which is in effect a motion for a mandamus requiring the council to submit a repealing by-law at the next municipal election—it is admitted on behalf of the council that the necessary steps have been taken entitling the petitioners to the mandamus unless disentitled thereto under 6 Edw. VII. ch. 47, sec. 24, sub-sec. 6, which reads as follows:—

“No by-law passed under the provisions of sub-section 1 of this section shall be repealed by the council passing the same until after a by-law for that purpose has been submitted to the electors and approved by three-fifths of the electors voting thereon, in the same manner as the original by-law, on the polling day at the third or some subsequent annual municipal election held after the passing of such original by-law; and in case such repealing by-law is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third annual municipal election thereafter . . .”

The applicant contends that on various grounds the proceedings in respect of the repealing by-law were invalid, and that, therefore, in law, no repealing by-law was submitted to the electors in 1909.

One objection is that the voting took place more than five weeks after the first publication of the by-law, and it is admitted that the by-law was first published in a newspaper upon the 11th November, 1908, and was thereafter published once in each consecutive week until the 23rd December, 1908, when it was published for the last time.

This objection seems fatal. The voting was had on the 4th January, 1909, being more than seven weeks after the first publication of the by-law. Section 338 of the Municipal Act, 1903, enacts that the day fixed for taking the votes “shall be not less than three nor more than five weeks after the first publication of the proposed by-law.” This provision is mandatory: *Re Arm-*

strong and Township of Toronto (1889), 17 O.R. 766; *Re Henderson and Township of Mono* (1907), 9 O.W.R. 599; and the council had no power to hold the election after five weeks from the 11th November, 1908.

On this ground alone, the by-law, if approved of by the electors and passed, would have been a nullity, and it is not necessary for me to deal with the other objections to its validity.

The question then to be determined is, whether the proceedings taken in respect of this repealing by-law, which, even if passed, could never have become a valid and effective repealing by-law, are a bar to the submission of another repealing by-law, until the third annual election of members of council after the 4th January, 1909.

The "repealing by-law" referred to in the sub-section above quoted includes those proceedings connected with its submission to the electors which are required by the statute in order that the repealing by-law, if approved by the electors, may constitute a valid foundation for the by-law to be finally passed by the council.

In adopting such proceedings it is the duty of the council to observe the requirements of the statute, and it is not open to that body to disregard its clear statutory duty, to the extent that, although the electors approve of it, nevertheless the repealing by-law can never ripen into a valid by-law, and repeal the then existing local option by-law.

The Legislature intended to secure to the electors the right to repeal a local option by-law at the third year after its passage, or at some subsequent triennial period computed from the time when they had submitted to them a repealing by-law which, if approved, was capable of being perfected into a legally binding by-law.

If the steps taken by the council in connection with a repealing by-law are illegal to the extent that it would be set aside, although carried by the required statutory majority, then it is manifest that the electors have not had that opportunity to repeal, which the Legislature contemplated, and that, under such circumstances, the proceedings incident to such invalid "by-law" should not be regarded as a submission to the electors of the repealing by-law referred to in sub-section 6, but should be treated as a nullity.

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It happens in the present case that the repealing by-law did not receive in its favour the majority necessary in order to carry it, but that circumstance does not, in my opinion, affect the meaning of the statute.

Suppose it had received the required majority, did the Legislature intend to empower the council, by disregarding its statutory duty of adopting legal steps in connection with its submission, to deprive the electors for three years of their right of repeal? I think not; and the statute must receive one and the same interpretation irrespective of the circumstance whether the repealing by-law does or does not receive the statutory majority necessary in order to bring about repeal.

For these reasons, I am of opinion that no repealing by-law within the meaning of sub-sec. 6 was submitted to the electors at the municipal election held on the 4th January last, and that the applicant is entitled to have such by-law submitted at the next annual municipal election. If he is content to take the undertaking of counsel that the council will submit the same, it will not be necessary to issue a mandatory order; otherwise he is entitled to it.

The municipality should pay the applicant's costs of this motion.

G. G.

[IN CHAMBERS.]

RE SWANICK AND KOTINSKY.

1909

Aug. 24.

Master and Servant—Summary Order of Magistrate under Master and Servant Act—Payment of Wages and Damages—Jurisdiction—Prohibition—Abortive Appeal.

A magistrate in dealing with a complaint under sec. 11 of the Master and Servant Act, R.S.O. 1897, ch. 157, has no jurisdiction to order payment of wages for any period after the discharge of the servant.

Goode v. Downing (1904), 5 Terr. L.R. 505, approved and followed.

Where a conviction under the Act expressly awarded damages as for wrongful dismissal, and the want of jurisdiction was thus apparent on the face of the proceedings, prohibition was granted.

Semble, that if the magistrate had severed the amount awarded for wages and damages, the prohibition might have been limited to the award of damages.

An abortive attempt to enter an appeal from the conviction did not disentitle the applicant to move for prohibition.

MOTION by George Swanick for an order prohibiting the police magistrate for the city of London from taking any further proceedings upon a conviction or order made by him on the 22nd April, 1909, under the Master and Servant Act, R.S.O. 1897, ch. 157; sec. 11, whereby the applicant was ordered to pay to one G. Kotinsky, the complainant, the sum of \$19 and costs.

The application was made upon the ground that the magistrate had no jurisdiction to make the order, inasmuch as the complainant was not, on his own evidence, entitled to wages, but only to damages for breach of contract.

The affidavit of the applicant stated that Kotinsky came to the Star Theatre at London, of which the applicant was the manager; that Kotinsky had been previously engaged by contract in writing by a booking agent in Detroit to play for three days for \$20; that, after the first performance, by virtue of a clause in the contract giving the applicant power to do so, he informed Kotinsky that his contract was cancelled; that Kotinsky then told the applicant that he had no money, and the applicant said he would allow him to play for the afternoon to enable him to earn his fare back to Detroit, but that he was only to play for the afternoon, and not for the three days as under the contract; that at the end of the afternoon's performance, the applicant

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offered Kotinsky \$3.70, the amount to which he was entitled for his afternoon's work, but he insisted on having \$20; that the applicant refused to pay him anything more or to allow him to go on the stage again.

The affidavit of the solicitor for the applicant stated that before the hearing of the case he pointed out to the magistrate that this was not a case where the informant had worked and earned the wages for which he had made complaint, and where the magistrate would have jurisdiction to order payment of wages under the Master and Servant Act, and that the complainant's proper remedy was an action in the Division Court for breach of contract; but the magistrate informed the deponent that he had already decided that matter in his Court adversely to the deponent's contention, and had held on previous occasions that he had jurisdiction to order payment of wages in cases where the facts were similar, and he would be obliged to so hold in the case before him.

The conviction or order was "for that the said George Swanick did on the 17th day of April, 1909, at the city of London . . . unlawfully refuse and neglect to pay to G. Kotinsky the sum of \$19 for wages and services due and owing to the said Kotinsky as a theatrical artist, from the 17th April, 1909, to the 19th April, 1909, inclusive, there being also included therein and forming part of the said amount damages to the said Kotinsky by reason of his wrongful dismissal by the said Swanick during a portion of the said period."

It also appeared that the applicant had launched an appeal to a Division Court from the conviction or order, but that no order was made upon the appeal because the notice of appeal was not properly served and was deficient in not stating the grounds of appeal.

Section 11 of the Master and Servant Act is as follows: "Any one or more of the justices, upon oath of such servant or labourer against his master or employer concerning any non-payment of wages, may summon the master or employer to appear before him or them at a reasonable time to be stated in the summons, and he or they . . . shall . . . examine into the matter of the complaint, whether the master or employer appears or not,

and upon due proof of the cause of complaint, the justice or justices may discharge the servant or labourer from the service or employment of the master, and may direct the payment to him of any wages found to be due, not exceeding the sum of \$40, and the justice or justices shall make such order for the payment of the said wages as to him or them seems just and reasonable, with costs”

The motion for prohibition was heard by FALCONBRIDGE, C.J.K.B., in Chambers, at London, on the 12th June, 1909.

W. R. Meredith, for the applicant. The magistrate ordered the payment of a sum of money as damages for breach of contract. This was beyond his jurisdiction. The complainant should have sued in a Division Court. The order is bad on its face, and prohibition ought to go: *Farquharson v. Morgan*, [1894] 1 Q.B. 552. The applicant does not lose his right by appealing to another forum: *In re Sullivan* (1862), 8 U.C.L.J.O.S. 276. The Division Court, however, was never seised of the appeal. As to the facts necessary to give jurisdiction, see *McDonald v. Stuckey* (1871), 31 U.C.R. 577; *Helps v. Eno* (1863), 9 U.C.L.J.O.S. 302; *In re Doyle* (1867), 4 P.R. 32; *In re Joice* (1860), 19 U.C.R. 197; *Cummins v. Moore* (1875), 37 U.C.R. 130.

J. M. McEvoy, for Kotinsky. The magistrate had jurisdiction, and prohibition does not lie. If the magistrate had jurisdiction at all, the Court has a discretion to refuse prohibition: *Re Lott v. Cameron* (1898), 29 O.R. 70. Having commenced an appeal, the applicant had elected his remedy, and the motion for prohibition should be refused: see Shortt on Informations, Mandamus, and Prohibition, p. 460; *Wiltsey v. Ward* (1882), 9 P.R. 216.

August 24. FALCONBRIDGE, C.J.:—Mr. Justice Scott has expressly held in *Goode v. Downing* (1904), 5 Terr. L.R. 505, that a justice of the peace has no jurisdiction under the Master and Servant Ordinance to order payment of wages for any period after the discharge of the servant. The Ordinance, like our statute, says that the justice “may direct the payment . . . of any wages found to be due”

With this opinion I am in entire accord.

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I have not found any other case precisely in point, but the following furnish some authority by implication for this view: *Hoggarth v. Taylor* (1867), L.R. 2 Ex. 105; *Jacquot v. Boura* (1839), 5 M. & W. 155; *Hatton v. Macready* (1844), 2 D. & L. 5; *World's Columbian Exposition v. Thompson* (1894), 57 Ill. App. 606; *Hartley v. Harman* (1840), 11 A. & E. 798.

Mr. C. B. Labatt, as *amicus curiæ*, has kindly referred me to authorities on this branch of the case which were not cited by counsel at the argument.

The conviction expressly awards damages as for wrongful dismissal, and the want of jurisdiction is apparent on the face of the proceedings.

Swanick's abortive attempt to enter an appeal to the Division Court does not disentitle him to move for prohibition: *In re Sullivan*, 8 U.C.L.J.O.S. 276.

If the magistrate had specified how much he awarded for wages and how much for damages, so as to make the amounts severable, I might have limited the prohibition to the award of damages.

The Division Court was never seised of the appeal, and so *Wiltsey v. Ward*, 9 P.R. 216, does not stand in the applicant's way.

Prohibition is granted—it is not a case for costs.

G. G.

[IN THE COURT OF APPEAL.]

RE BREWER AND CITY OF TORONTO.

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April 19
April 29.

Municipal Corporations—By-law of City Council Limiting Number of Tavern Licenses—Powers of Council—Liquor License Act, sec. 20(1)—Construction and Effect—Annexation of Town to City—Repeal of Town By-law—Annexation of New Territory to City after First Reading of By-law—By-law not Re-introduced—Motion to Quash—Discretion.

A by-law passed by the council of the city of Toronto, on the 15th February, 1909, providing that the number of tavern licenses to be issued in the city "for the ensuing license year beginning on the 1st day of May, 1909, and for each subsequent license year until this by-law is altered or repealed, shall be limited to one hundred and ten:"—

Held, within the powers conferred upon councils by sec. 20(1) of the Liquor License Act, R.S.O. 1897, ch. 245, to "limit the number of tavern licenses . . . for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed."

On the 9th February, 1908, the town of East Toronto passed a by-law limiting to five the number of licenses that might be issued in that town; on the 15th December, 1908, the town became annexed to and part of the municipality of the city of Toronto; and thereafter the city council passed the by-law in question. It was argued that there were two by-laws in force dealing with the same matter, but unequal in their effect:—

Held, that the city by-law applied to the whole territory embraced within the city limits, and in effect repealed any by-laws inconsistent with it. It was also objected that after the first reading of the city by-law some other outlying territory became annexed to the city, and that the by-law should have been re-introduced before being finally passed:—

Held, that, the by-law being legal on its face and nothing fraudulent or improper being shewn, the Court should, in its discretion, decline to quash the by-law on this ground.

Re Second and County of Lincoln (1865), 24 U.C.R. 142, followed.

Order of MEREDITH, C.J.C.P., refusing to quash the by-law, affirmed by a Divisional Court holding as above; and leave to appeal refused by the Court of Appeal.

Per OSLER, J.A., delivering the judgment of the Court of Appeal, refusing leave to appeal:—The plain object and intent of sec. 20(1) of the Liquor License Act is to enable the council to do one of two things: (1) to pass a by-law limited in its operation to the then ensuing license year, which will come to an end, *ex vi termini*, at the end of that year, leaving the next succeeding license year to be provided for, if at all, by a new by-law to be passed before the 1st day of March next before its commencement; or (2) to pass a general by-law applicable to any future license year, commencing with the 1st day of May after its passage. The expression "any future license year" means "all" future license years.

The omission of the council to re-introduce the by-law and to read it a first and second time after the annexation of additional territory was merely a matter of the internal regulation of their business, which, in the absence of statutory obligation, they were at liberty to alter or suspend at their discretion.

APPEALS by John Brewer and William Robinson from orders of MEREDITH, C.J.C.P., refusing their applications to quash a by-

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law of the municipal corporation of the city of Toronto limiting the number of tavern licenses. The by-law was passed on the 15th February, 1909, and read as follows:—

I. The number of tavern licenses to be issued in the city of Toronto for the ensuing license year beginning on the 1st day of May, 1909, and for each subsequent license year until this by-law is altered or repealed, shall be limited to one hundred and ten.

II. Section 2 of by-law No. 4311, being “A By-law relating to Tavern and Shop Licenses,” and any other by-law or portion of a by-law inconsistent herewith, are hereby repealed.

The two appeals were argued together on the 5th and 6th April, 1909, before a Divisional Court composed of MULOCK, C.J. EX.D., MACLAREN, J.A., and CLUTE, J.

A. M. Lewis, for Brewer.

J. B. Mackenzie, for Robinson.

W. C. Chisholm, K.C., and *F. R. MacKelcan*, for the city corporation.

April 19. The judgment of the Court was delivered by MULOCK, C.J.:—One ground of appeal was that the by-law purported to limit the number of licenses for a longer period than one license year, namely, “for each subsequent license year until this by-law is altered or repealed,” and that it was in excess of the powers conferred upon councils by sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245, to limit the number for a period longer than the then next ensuing license year.

Section 20(1) reads as follows:—

“The council of every city, town, village or township may, by by-law to be passed before the 1st day of March in any year, limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act.”

In support of this ground of appeal it was contended that the section means that the council may in its discretion limit the number of licenses for the next ensuing license year, but no

longer, or that, passing over such next ensuing license year, it may limit the number for any future year, and that, in such latter event only, would the by-law remain in force until altered or repealed.

I am unable to accede to this argument. If such interpretation were placed upon the section, it would follow that a by-law taking effect on the 1st day of May then next, would cease to exist at the end of one year from the 1st May, whilst a by-law applicable to a future year would remain in force until action by the council by way of repealing or altering it. Much clearer language than is here used would be necessary in order to warrant the conclusion that the Legislature intended that a by-law to take effect in some future year would continue thereafter in force until altered or repealed, whilst a by-law applicable to the then ensuing year would terminate at the end of such year. If such an interpretation were placed upon the section, then the council could pass no by-law applicable to the next ensuing license year which would continue in force for a longer period than one year. If the section were open to the construction placed upon it by the appellants—namely, that it is discretionary with the council to pass a by-law for the next ensuing license year, or for some future year—then the words “altered or repealed” apply to either class of by-law, and a by-law which, by its express language, was passed for “the then next ensuing license year,” would be construed as having added thereto the words of the statute, and would continue in force thereafter in future years until altered or repealed. The section is not happily worded, but its meaning does not seem to me open to doubt. A by-law passed for the next ensuing license year continues in force throughout future years “till altered or repealed,” and the words in the section “or for any future license year” may be regarded as surplusage.

It cannot be contended that the council may not pass a by-law for the next ensuing license year. If they should do so, such a by-law, without more, would continue in force for future years until altered or repealed. It would be a by-law for the next ensuing license year “and” for future years, etc. It is thus clear that the word “or,” in the fifth line of the section, was

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intended to be read as “and,” and, so construing it, the by-law was within the provisions of the section, and the first ground of appeal fails.

The next objection is that the town of East Toronto, which now forms part of the city of Toronto, passed a by-law on the 9th February, 1909, limiting to five the number of licenses that might be issued in that town; that on the 15th December, 1908, the town of East Toronto became annexed to and formed part of the municipality of the city of Toronto, their by-law being then in force; and that thereafter—namely, on the 15th February, 1908—the municipal corporation of the city of Toronto passed the by-law in question, limiting the number of tavern licenses that might be issued in the city of Toronto to 110; whereby it is argued that there are now two by-laws in force dealing with the same matter, but unequal in their effect.

The answer to this objection seems very obvious. When the town of East Toronto became a portion of the municipality of Toronto it became subject to the powers of the municipal corporation of the city of Toronto in respect of limiting the number of tavern licenses, and when the corporation of the city, in the exercise of its corporate powers, passed the by-law in question, limiting the number of tavern licenses to be issued within what then constituted the limits of Toronto to 110, that by-law applied to the whole territory embraced within the city's limits, and in effect repealed any by-laws inconsistent with it. Thereupon the by-law of what was formerly the town of East Toronto ceased to exist, and this objection fails.

The last objection is that after the first reading of the by-law now attacked some other outlying territory became annexed to the city, and that the by-law should have been re-introduced before its final passage. Assuming that such would have been the more regular course, no one appears to have objected to the method which was pursued, and, doubtless, and by apparent inadvertence and not by design, it passed through its final reading without such re-introduction. It is reasonable to assume that if any person had suggested the re-introduction of the by-law that course would have been adopted. Nevertheless, we are urged to quash the by-law on the mere technical ground that its

first reading preceded the actual annexation of the added territory, although such addition, for all that here appears, may then have been practically agreed to by the different communities interested in promoting the same, and although, after such annexation, the council, if it had deemed it advisable, might have re-introduced the by-law, and given it its various readings, in strict compliance with the rules of procedure. The by-law on its face is legal, and under such circumstances as the present it is discretionary with the Court, whether upon extraneous evidence it will find such illegality in connection with its passage that it would be unjust to permit it to remain in force. Nothing fraudulent or even improper in connection with the by-law being shewn, we should follow, I think, the principle adopted in *Re Secord and County of Lincoln* (1865), 24 U.C.R. 142, referred to in *Re Jones and City of London* (1899), 30 O.R. 583, at p. 587, and not undo the city's action in the passage of the by-law. I therefore think this objection must also be disallowed.

It was further urged that the annexation of East Toronto and other territory had the effect of repealing a former by-law passed by the municipal corporation of the city of Toronto whereby the number of tavern licenses was limited to 150. I fail to see how this objection can support the appellants' appeal. It is rather an argument in favour of the by-law now under review, which, as already observed, repealed all inconsistent by-laws, and amongst them the by-law formerly allowing 150 licenses.

For these reasons I think the appeal should be dismissed with costs.

Brewer and Robinson moved for leave to appeal to the Court of Appeal from this judgment, and the motion was heard before MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., on the 21st April, 1909.

A. M. Lewis, for Brewer.

J. B. Mackenzie, for Robinson.

F. R. MacKelcan, for the city corporation.

April 29. The judgment of the Court was delivered by OSLER, J.A.:—In my opinion leave to appeal should be refused.

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As to the first objection, I think the by-law is in substance sufficient, though it seems to have been passed without any clear apprehension of the proper construction of sec. 20 of the Liquor License Act. That section enacts that the council may, by by-law to be passed before the 1st March in any year, limit the number of tavern licenses to be issued (in the municipality) for the then ensuing license year beginning on the 1st May, or for any future license year until such by-law is altered or repealed.

The license year commences on the 1st May in each year and ends on the 30th April in the next ensuing year: the Liquor License Act, R.S.O. 1897, ch. 245, sec. 8(1)(2).

Any by-law to limit the number of licenses must be passed before the 1st March in any year, and, whatever may be its scope, it must go into effect on the 1st May of the year in which it is passed, if it is not repealed, as of course it may be by the same council before that date.

The case does not, in my view of the meaning of the section, turn at all upon the question upon which so much was said on the argument, whether the word "or" at the commencement of the last branch of sec. 20 should be read "and."

The plain object and intent of the section is to enable the council to do one of two things, namely: to pass a by-law (1) limited in its operation to the then ensuing license year, which will come to an end, *ex vi termini*, at the end of that year, leaving the next succeeding license year to be provided for, if at all, by a new by-law to be passed before the 1st day of March next before its commencement; or (2) a general by-law applicable to any future license year, commencing with the 1st day of May after its passage. The expression "any future license year," plainly means "all" future license years. There is nothing to restrict the generality of the word "any." It is a word which excludes limitation or qualification: *Duck v. Bates* (1883), 12 Q.B.D. 79; *Liddy v. Kennedy* (1871), L.R. 5 H.L. 134; *Isle of Wight R.W. Co. v. Tahourdin* (1883), 25 Ch. D. 320, at p. 332; *Beckett v. Sutton* (1882), 51 L.J. Ch. 432, at p. 433; and other cases cited in Stroud's Judicial Dictionary, *sub voce*. And it is to such a general or standing by-law, as I may call it, that the words "until such by-law is altered or repealed" apply, since

there can be no repeal or alteration of a by-law which has come into force, and which is confined to the limitation of licenses for "the then ensuing license year," nor indeed of any by-law, general or annual, so as to affect the limitation upon the issue of licenses in any license year in which it may be in force.

A by-law to limit the issue of licenses for any future license year necessarily includes the then ensuing license year commencing on the 1st day of May after its passage, as well as subsequent license years, and a by-law so expressed, without specifically mentioning the then ensuing license year, would have well attained the object aimed at, namely, a general or continuing by-law to remain in force until altered or repealed. In effect, I consider that this is what has been done, though from excess of caution or from not attending to the language of the section, the city council thought proper to divide the future into two parts, namely, the "ensuing" license year and the "subsequent" license years. But these two expressions cover the whole; and therefore the by-law is one which provides a limitation for any future license year—sc., "all" future license years—after its passage, and will remain in force until altered or repealed as provided by the section. I do not agree with the view which seems to have found favour with the Divisional Court that a by-law providing merely for a limitation of the number of licenses to be issued for the then ensuing license year continues in force throughout future years until altered or repealed, treating the words "or for any future year" as surplusage.

As to the license limitation by-law of East Toronto, a corporation the territory of which had become annexed to and was part of the city of Toronto before the passage of the by-law now in question, I am unable to see how the former can in any way affect the validity of the latter, or be thought to restrict the right of the city council to pass a by-law affecting the whole territory then under the jurisdiction of the city council. The corporation of East Toronto no longer existed, and the by-law of the city of Toronto council applied to and came into operation in respect of the whole territory then forming part of the city. It appears to me that the by-law was absolutely inconsistent with the continued existence and operation of the East Toronto by-law.

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Whether, if the city had passed no by-law, the East Toronto by-law would have continued to affect the added territory is a question we are not concerned with, and it is probably enough to say that, the by-law being good on its face, nothing appears to justify its being interfered with.

A further objection was that after the city by-law had been introduced and read a first time the additional territory of Wychwood and Bracondale was annexed to the city, and that after this the by-law was read a third time and passed. It was contended that the by-law should have been again introduced and the regular course of procedure of the council followed in reading it a first and second time after the addition of the new territory. But this procedure was merely matter of the internal regulation of the business of the council, which, in the absence of statutory obligation, they were at liberty to alter and suspend at their discretion, and failure to observe it, even in the absence of formal alteration or suspension, cannot, as a general rule, be invoked for the purpose of attacking a by-law which is within the jurisdiction of the council and is good on its face.

On the whole, I am of opinion that the applicants fail to shew that the result arrived at by the council by-law is wrong, and therefore leave to appeal should be refused. The applicants' contention that leave to appeal is not necessary seems to be only an additional reason for refusing it.

G. G.

[DIVISIONAL COURT.]

LUDLAM-AINSLIE LUMBER CO. v. FALLIS.

D. C.

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Mechanics' Liens—Sub-contractor—Material-man—Registration of Lien—Time—Material not actually Used in Building or Placed on Land—R.S.O. 1897, ch. 153, secs. 4, 22.

The plaintiffs contracted with E. to supply him with lumber to be used in the construction of a building which he was erecting for the defendant on lands in Port Arthur, at the price of \$454.82. The lumber was sent in different shipments, the last of which arrived at Port Arthur on the 11th November, 1907, and was taken possession of by E.'s foreman, but was not in fact used in the defendant's building or placed upon his land. E. having made default in payment, the plaintiffs on the 10th December registered a claim for lien on the lands under the Mechanics' Lien Act for the price of the lumber:—

Held, reversing the judgment of BRITTON, J., at the trial, that the lien was registered too late, as it was not registered until more than thirty days had elapsed since any material furnished by the plaintiffs had been placed upon the land or used in the construction of the building.

Bunting v. Bell (1876), 23 Gr. 584, and *Hall v. Hogg* (1890), 20 O.R. 13, considered.

Semble, that the lien would have attached if the material had been placed upon the land, under the control of the owner, within the thirty days, even although not incorporated in the building.

APPEAL by the defendant Fallis from the judgment of BRITTON, J., in favour of the plaintiffs, in an action to enforce a mechanics' lien. The facts are fully stated in the judgment of BRITTON, J., before whom the action was tried without a jury at Port Arthur on the 27th November, 1908.

F. H. Keefer, K.C., for the plaintiffs.

A. J. McComber, for the defendant Fallis.

December 17, 1908. BRITTON, J.:—The defendant Fallis is the owner of land in Port Arthur, and he contracted with one G. J. Edge for the erection of a house thereon. The contract was a verbal one. Edge was to furnish all lumber and do all the work for \$3,400. The defendant Fallis was to supply all hardware, tiling, glass, glazing, painting, heating plant, plumbing, and electrical fixtures.

Edge contracted with the plaintiffs for the lumber or a portion of it to be used in this building for the price of \$454.82—the lumber to be delivered to Edge on the dock at Port Arthur.

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The lumber was sent by the plaintiffs in five different shipments; the last one was shipped at Sarnia on the 8th November, 1907, and arrived at Port Arthur on the 11th November. This lumber was in fact taken possession of by Kennedy, who had been foreman for Edge, and at a time before the plaintiffs had any notice or knowledge of Edge going away. Although Kennedy took possession of this last consignment, he says that it was not in fact used in the defendant's building. It was of comparatively small value, but was part of the \$454.82 above mentioned, and was furnished, as were all the materials making that sum, by the plaintiffs for the defendant's building, and furnished to the contractor Edge. On or about the 1st November, 1907, Edge left Port Arthur. His foreman, Kennedy, continued the work for a time as if Edge had not gone; then, under some arrangement between Kennedy and the defendant, Kennedy completed the building. There was no claim made at the trial by the defendant for damages by reason of Edge's failure to fulfil his contract.

On the 26th November the plaintiffs, in ignorance of Edge having gone, and in ignorance of any change in the work upon the defendant's building, drew upon Edge for \$350 on account, and they wrote to Edge, and also to the defendant, asking the defendant to protect the draft.

On the 30th November the defendant replied to the plaintiffs as follows: "Yours of the 26th received. In regard to the draft which you state you have passed on Mr. Edge for \$350 for material for house, Mr. Edge is out of the city at the present, and word came from him to-day stating he would be back about the 20th December—if possible before—and have no doubt he will honour your draft on his return. I have paid him everything up to date, and feel quite sure you will have no trouble on his return. Yours very truly, L. J. Fallis."

Kennedy says the house was completed on the 20th November.

On the 23rd November, 1907, George Otto registered a lien.

On the 7th December, 1907, the plaintiffs registered a lien for their claim. This was regarded as not technically complete or sufficiently full, so another more carefully prepared instrument was registered on the 10th December.

On the 12th December the Pigeon Lumber Company registered a lien.

On the 4th May, 1908, the plaintiffs commenced their action to enforce their lien, and they caused a *lis pendens* to be registered on that day.

On the 1st November, 1907, including a payment of \$250 to Edge on that day, the defendant had paid \$2,444 on account of Edge's contract. Subsequent to the 1st November, and prior to the registration of the plaintiffs' lien, the defendant paid to different persons, including \$100 to Otto, the sum of \$533.75.

After the registration of the plaintiffs' lien, the defendant paid Otto's lien, \$96, and two other small claims of \$4 and \$5, making the total amount paid by the defendant \$3,082.75, and the defendant says he has assumed, whatever that may mean, the Pigeon River claim, which was registered on the 12th December, after the registration of the plaintiffs' lien.

I find that the plaintiffs furnished to the contractor Edge materials to be used in the defendant's building in the erection thereof; they were furnished as ordered by the contractor to the value of \$454.82, as claimed in the lien registered. The last of these materials were furnished on the 11th November, 1907. The plaintiffs' lien was registered on the 10th December, and I find it was duly registered in substantial compliance with secs. 17 and 18 of ch. 153, R.S.O. 1897.

It may be, and very likely is, the case, that some of the material taken by Edge prior to the last shipment was not actually "placed" in the building until after the 8th November. The evidence was not clear upon that, but, if I am right in holding that the last delivery of material was complete to the contractor on the 11th November, as it was ready for him then at Port Arthur, then it is not of moment to consider when any of the plaintiffs' material was actually last placed in the building.

From the evidence, and during the trial, I thought it a case that should have been settled. Why the defendant should assume liability to the Pigeon River Company, and seek to leave the plaintiffs out, I cannot understand. The defendant knew that the plaintiffs were furnishing materials for his residence, and that the contractor was not paying for these materials. As

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between men desirous of doing the right thing, there should be no need of incurring the large costs involved in an expensive reference.

There should be judgment declaring the plaintiffs entitled to a mechanics' lien on the lands and premises in question in this action for the sum of \$454.82 as a first mortgage, which lien is payable out of any money applicable thereto, and due and owing from the defendant Fallis to the contractor Edge, or that should be due and owing had the defendant retained money in his hands as required by the statute, and the plaintiffs are entitled to priority over the claims of the defendants the Great West Life Insurance Company and Emma Bradburn, as mortgagees, to the extent by which the selling value of said lands has been increased by the work done thereon and materials furnished by the plaintiffs or the said Edge, as in the pleadings mentioned, or any sub-contractor under him; and I direct that it be referred to the local Master at Port Arthur to inquire as to other incumbrancers than the said mortgagees, and to make them parties, and to make all necessary inquiries and to take all necessary accounts and tax costs, for the purpose of ascertaining the rights of the parties, having regard to the declaration aforesaid, and to appoint a time and place for payment of what shall be found due to the plaintiffs and other lien-holders and incumbrancers, and, in default of payment, to sell the interest of the defendant Fallis in the said lands. In that event the mortgagees named to be at liberty to pay into Court the amount by which the selling value of the said lands has been increased by the work done and the materials provided by the plaintiffs and Edge and any sub-contractors under him, which sum is to be applied in payment *pro ratâ* of the claims of the plaintiffs and other lien-holders entitled to share therein, and upon such payment the plaintiffs and other lien-holders are to release their claims against the mortgagees, but, in default of payment by the mortgagees, the said lands are to be sold free from their claims, and in either case proceeds of sale to be paid into Court and to be applied: first, in payment of costs of sale; second, in case the lands are sold free from claims of mortgagees, an amount equal to the sum by which the selling value of the said lands

has been increased by the work done and materials furnished by the plaintiffs and Edge and sub-contractors under him is to be set apart, which sum is to be applied in payment of the claims of the plaintiffs and other lien-holders, if any, entitled to share therein; third (in case the said lands have been sold free from the claims of the defendants the mortgagees), in payment of the claims of the mortgagees according to their priority, to be ascertained by the said Master, and then in payment of the claims of the plaintiffs and other lien-holders and incumbrancers; or, in case the lands have been sold subject to the claims of the said mortgagees, then in payment of the said liens or the residue of the said liens of the plaintiffs and other lien-holders and incumbrancers, according to their priorities; and the residue of the said purchase money is to be paid to the defendant Fallis, or such other person as the said Master shall find entitled thereto. The defendant Fallis to pay costs down to and inclusive of trial. Other costs to be added to the claims and paid as above directed.

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From this judgment the defendant Fallis appealed, and the appeal was heard by a Divisional Court composed of MULOCK, C.J. Ex.D., CLUTE and LATCHFORD, JJ., on the 7th and 8th April, 1909.

Casey Wood, for the appellant, the defendant Fallis.

R. J. Towers, for the plaintiffs.

June 21. CLUTE, J.:—The question raised on this appeal is whether a sub-contractor is entitled to recover for the value of material sold to the contractor, but which was not actually placed in the building or upon the land upon which the building was being erected. The Mechanics' Lien Act, R.S.O. 1897, ch. 153, sec. 4, provides that "any person who . . . places or furnishes any materials to be used in . . . constructing . . . any . . . building . . . for any owner, contractor or sub-contractor, shall, by virtue thereof, have a lien for the price of such . . . materials upon the . . . building . . . and the lands . . . upon or in respect of which . . . such materials are placed or furnished to be used . . ."

Section 22 provides that the claim for lien by a contractor or

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sub-contractor may be registered before or during the performance of the contract or within thirty days after the completion thereof. Sub-section 2: "A claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed."

Is the sub-contractor entitled to his lien as soon as he delivers the material to the contractor, no matter whether it be placed upon the land or incorporated in the building or not? I cannot think that this is the true construction of the Act, the meaning of which I take to be that where the owner of the land receives the benefit of the labour or material a lien attaches, not to the material furnished, but to the land, because the owner is benefited thereby, and, it may be, that such lien attaches if the material is furnished upon the land to which the lien may attach, even although not incorporated in the building, if the same is under the control of the owner. This, I think, is apparent, having regard to the various sections of the Act.

Under the Act "contractor" means the person contracting with the owner; "sub-contractor" is a person not contracting with or employed directly by the owner, but by the contractor, or, under him, by another sub-contractor; "owner" includes any person having any estate or interest in the lands upon or in respect of which the work or service is done or materials are placed or furnished, at whose request and upon whose credit or on whose behalf or for whose direct benefit materials are placed or furnished.

Section 16, sub-sec. 1, provides that during the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien, and sub-sec. 3 provides that when any material is actually brought upon any land to be used in connection therewith for any of the purposes enumerated in sec. 4 of the Act, the same shall not be subject to execution or other process to enforce any debt due by the person furnishing the same, the meaning of which I take to be that the lien having attached to the land because of the material furnished and being upon the land, the creditors of the person who furnishes the same have no right to pursue the property there to satisfy their

claims. His estate is not lessened by reason of the delivery because of his lien against the land, and no wrong is suffered by such creditors.

It seems to me that a great mischief would follow any other view of the statute. If the lien attaches to the land as soon as the delivery takes place by the sub-contractor to his contractor, it would follow that what would practically be a mortgage upon land might be created by goods being delivered to the contractor at a distance, or even in a foreign country. It seems absurd to say that there can be a lien upon land where the material for which the lien is created has never become incorporated with the land or been placed thereon. The wording of secs. 4 and 22 shews, I think, that the material must at least be placed upon the land. The person furnishing the material has a lien for the price upon the land "upon which such materials are placed or furnished to be used." Sub-section 2 of sec. 22 provides for the registration of the lien within thirty days after the furnishing or placing of the last material so furnished and placed.

In *Bunting v. Bell* (1876), 23 Gr. 584, it was held, at p. 587, *per* Proudfoot, V.-C., that "as between lien-holders *inter se* and for materials furnished to a contractor, there is no lien under this Act (the Act of 1874), until the materials have been affixed to the building or erection. The Act gives no lien on the materials or machinery furnished as such, but only on the land or the estate of the owner. When they have become affixed, and so form part of the realty, a lien arises in regard to them as part of the land. Until so affixed the parties are left to the remedies in existence before the Act. To use Mr. Phillips's language, sec. 176, 'The whole object under the Act is to prevent the owner of lands, whatever his estate in them, from getting the labour and capital of others without compensation.' " And again (p. 588): "It seems to me unreasonable and unjust to give the person furnishing such materials, which have not gone to increase the value of the land, a right to payment out of the property of others which had increased the value, or against the owner who had made no bargain for the purchase of them, and whose property was not benefited by them."

The present Act differs in its wording from the Act of 1873-4,

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but, so far as it affects this question, the meaning is, I think, the same. That is, where material is furnished, the lien in respect thereof is limited to such material as is placed upon the land upon which the lien attaches.

In *Hall v. Hogg* (1890), 20 O.R. 13, the lien was registered on the 23rd December and the last item of material was charged on the 22nd November. The Chancellor says (p. 15): "The Master finds that the last articles supplied by these material-men to the contractor were brought upon the premises subject to the lien on the morning of the 23rd November, and were placed in the building that same day. That, however, is not the critical test of time, as I read the Act. The last goods supplied by these merchants were four locks, which by the account rendered were sold and charged for as on the 22nd November, and there is no evidence to displace the accuracy of this date. Apparently they were bought by Hogg the contractor in person, and were by him brought to the premises in question. There was no contract for the placing of these materials on the property by the claimants; all they had to do in the transaction of furnishing or supplying was ended with the sale and delivery of the goods in the usual course of business; and the time for registering a lien runs as to them from the day of that sale and delivery. . . The materials being supplied on the 22nd November, time began to run next day, and the thirty days expired on the 22nd December."

Section 21 of R.S.O. 1887, ch. 126, referred to by the Chancellor, reads as follows: "In other cases the claim of lien may be registered before or during the progress of the work, or within thirty days from the completion thereof, or from the supplying or placing the machinery."

This section is now embodied in sub-secs. 1 and 2 of sec. 22 of R.S.O. 1897, ch. 153, and is modified in its language. The language now is that the claim for lien for materials may be registered within thirty days after the placing or furnishing of the last material so furnished and placed. Section 21 (referred to by the Chancellor) is "from the supplying or placing the machinery." I deem this to be very material. The material must be furnished and placed—at least there is thirty days

allowed after it is so furnished and placed. Under the Act as it now stands, I am of opinion that it is essential before the lien can arise that the material should be furnished and placed upon the land upon which the lien is claimed. In the present case it is conceded that the last of the material sold to the contractor was never used upon the building or even placed upon the land, and that more than thirty days elapsed between the time any material furnished by the plaintiffs was placed upon the land or used in the construction of the building, and the registration of the lien.

I am therefore of opinion that no lien attached.

It was further urged by Mr. Wood that the sale of the material was free on board, Port Arthur; that the plaintiffs did not pay the freight, and the material remained upon the wharf until after the building was completed. In answer to this it was said that the materials furnished by the plaintiffs were shipped in four lots, and, although the contract called for the payment of the freight by the vendors, yet, as a matter of convenience and practice, the freight was paid by the contractor and deducted and charged to the plaintiffs; that the amount of freight for the last delivery was only fifty cents, and that this was not a ground of its non-acceptance; that, as a matter of fact, the contractor had absconded before the last shipment arrived, and it never was in fact delivered to him, although afterwards it was taken to his premises (not the land in question) by one Kennedy, who is in the employ of the contractor, and who, after he left, finished the job. If the case turned solely upon this question, I should be inclined to take the view that, having regard to the manner in which the parties had dealt with the previous deliveries, it might fairly be implied that the terms of the contract had become modified to the extent that the contractor should pay the freight and charge the same to the plaintiffs, and that, therefore, when the goods reached the wharf, the contractor having received the four previous shipments, there was a sufficient delivery. But, in the view I take of the case, it is not necessary to decide this question.

The appeal should be allowed, and the judgment, so far as it creates a lien upon the land, should be reversed, and a declaration made to the effect that the plaintiffs are not entitled to a lien upon the lands and premises in question.

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The judgment of the trial Judge should be reversed and judgment entered for the defendant, with costs below and of this appeal.

MULOCK, C.J., and LATCHFORD, J., concurred.

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[DIVISIONAL COURT.]

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June 30.
Sept. 29.

RATHBONE v. MICHAEL.

Mechanics' Liens—Material-man—Contract—Material Supplied outside of Contract—Time for Registration of Lien—R.S.O. 1897, ch. 153, sec. 22, sub-sec. 2.

The words "the last material" in sec. 22, sub-sec. 2, of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, providing that "a claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of *the last material* so furnished and placed," mean the last material furnished by the material-man under his contract, where there is a distinct contract; and where he furnishes materials outside of his contract, the time for registering his claim for lien in respect of the material supplied under the contract begins to run from the time of the last delivery of material under the contract, without regard to the time of delivery of material outside of the contract.

Lindop v. Martin (1883), 3 C.L.T. 312, and *Morris v. Tharle* (1893), 24 O.R. 159, distinguished.

APPEAL by the defendants the owners from the judgment of Mr. J. A. C. Cameron, official referee, in an action to enforce a mechanic's lien. The facts of the case are sufficiently set forth in the judgment of CLUTE, J., *infra*.

The appeal was heard by a Divisional Court composed of MULOCK, C.J. Ex.D., CLUTE and LATCHFORD, JJ., on the 8th April, 1909.

W. Laidlaw, K.C., for the appellants.

J. Bicknell, K.C., for the plaintiff.

June 30. CLUTE, J.:—The referee declared that the plaintiff is entitled to a lien upon the lands in question for \$1,072.98, and, further, that the plaintiff is entitled to a personal judgment

against the defendant John Michael for the said amount. The plaintiff's contract with the defendant Michael was in this form: "I hereby confirm my agreement to supply the following bill of material for Annette Street Methodist Church, Toronto Junction, for the sum of \$1,700, as follows." The particulars were then stated. The plaintiff supplied the material mentioned in the contract, and received in payment thereof \$700, leaving a balance in respect of the contract of \$1,000. The balance of the claim is made up of material ordered from time to time. The last of the items of material furnished under the contract for \$1,700 was on the 16th September, 1908. The first item of material furnished outside of the contract was on the 1st August, 1908, and the last item of material furnished outside of the contract was on the 8th October, 1908.

The finding of the learned referee is in part as follows: "I find that there was a contract entered into between the plaintiff and the defendant Michael for the supply of certain material for use in the erection of said church. The contract is dated and entered into on the 8th April, 1908, and by this contract the plaintiff agreed to furnish certain specified materials to the defendant Michael for the sum of \$1,700. This material was all supplied by the plaintiff to the defendant. The last delivery of said material under this contract was on the 16th September, 1908. The defendant Michael, during the course of carrying on his contract with the trustees, found that he required further material, and purchased from the plaintiff material aggregating the sum of \$75.17. This material was furnished between the 1st August, 1908, and the 8th October, 1908, on separate orders from time to time, and there was no evidence of any prior understanding. By arrangement between the parties it appeared that the defendant was entitled to a further credit, and the amount of the plaintiff's claim was reduced to \$1,075.17. There is no dispute as to the amount of the plaintiff's claim. I find that proceedings to enforce the plaintiff's claim were commenced on the 4th November, 1908."

He further finds that the plaintiff is entitled to recover the sum of \$1,075.17 and costs, and to a lien on the lands described. He then proceeds: "In order to arrive at the above conclusions

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it is necessary to decide that a material-man has thirty days from the delivery of the last material to the contractor to take proceedings to enforce his lien. I think this is the proper construction to be placed on the provisions of the Mechanics' and Wage-Earners' Lien Act applicable, rather than to hold that each supply of material was a separate and distinct transaction."

The question turns upon the meaning of the Mechanics' Lien Act, R.S.O. 1897, ch. 153, and principally on secs. 4 and 22. Mr. Laidlaw contends that the contract is to be regarded as quite distinct from the subsequent orders, and that, inasmuch as the lien was not placed within thirty days after the last delivery under the contract, namely, the 16th September, no lien exists in respect of that contract. Section 22, sub-sec. 1, provides that a claim by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or within thirty days after the completion thereof, or (as amended by 2 Edw. VII. ch. 21 (O.)) a claim for lien by a contractor may be registered within seven days after the architect has given or refused to give his final certificate. It will be noticed here that the registration under this sub-section must be made during the performance of the contract or within thirty days after the completion thereof. This refers, I think, to the original contract and not to the sub-contract, and is limited to cases not otherwise provided for. Now the lien for materials is provided for in the next sub-section, and therefore is not affected by sub-sec. 1. Under sub-sec. 2, which is the present case, the claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished or placed. It is contended on behalf of the plaintiff that in this sub-section "the last material" means, not the last material upon any particular contract, but the last material furnished upon the building, even although the furnishing of such material may be on several distinct contracts, and that therefore the material furnished in this case in October was within time to entitle the plaintiff to register a lien for the material furnished under the contract, and also under the subsequent orders.

In *Lindop v. Martin* (1883), 3 C.L.T. 312, it was held that the furnishing of goods from day to day must be considered as a continuing contract, for the whole of which a lien might be in force, though some of the goods were supplied thirty days before the registering of the lien.

In *Morris v. Tharle* (1893), 24 O.R. 159, it was held that "where there is a prevenient general arrangement, although not binding, between a contractor and a supplier of building material, whereby the former undertakes to procure from the latter all the material required for a particular building contract, so that, although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides; and a lien for all material so supplied is in time if filed within thirty days of the furnishing of the last item." This decision is under R.S.O. 1887, ch. 126, sec. 21, which reads: "In other cases the claim of lien may be registered before or during the progress of the work, or within thirty days from the completion thereof, or from the supplying or placing the machinery."

It is to be observed that the statute has been changed, and sec. 22, sub-sec. 2, of R.S.O. 1897, ch. 153, provides for the registration of the lien for materials within thirty days after the furnishing or placing of the last material so furnished and placed.

I think it is clear that the decisions above referred to do not extend to a case like the present, where there is a distinct contract, and the material delivered thereunder is not so delivered within thirty days of the registration of the lien. Nor do I think that the change in the statute has so extended the same as to make it applicable to a case like the present.

"Sub-contractor," under sec. 2; sub-sec. 2, is defined to mean "a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor." Section 4 gives a lien to any person who furnishes material to be used in the buildings or constructions therein referred to "for any . . . sub-contractor . . ." The

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lien is given in respect of material for the building or erection under a contract made with the sub-contractor, and it is the last of the material so furnished and placed under such a contract with a sub-contractor that sec. 22, sub-sec. 2, has reference to.

I am therefore of opinion, with respect to the material delivered under the contract in this case, that the plaintiff, by reason of not having registered a lien within thirty days from the last delivery, was not entitled to a lien, and that in that respect the ruling of the learned referee was wrong, and should be set aside. The plaintiff, however, is entitled under the decisions above quoted to a lien for \$75 for the deliveries under the last two named orders. The judgment will therefore be modified accordingly. Section 47 of the Act provides that all judgments in favour of lien-holders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after sale of the property adjudged to be sold, and the same may be recovered by execution against the property of such person or persons. The judgment for the plaintiff against the owner will be modified to conform to the terms of this section. The plaintiff is entitled to the costs of the proceedings before the official referee, and the costs of the appellants, in so far as they were increased by reason of the claim to a lien for the full amount, may be set off against the plaintiff's costs. The defendants are entitled to the costs of this appeal.

MULOCK, C.J., and LATCHFORD, J., concurred.

[NOTE.—On the 27th September, 1909, the plaintiff moved before the same Divisional Court to re-open the appeal and have the case referred back to the referee, on the ground that new evidence had been discovered shewing that the delivery of material on the 8th October, 1908, had been improperly charged as an extra under an order subsequent to the contract, and that it should have been charged under the original contract, so that as a matter of fact the material was delivered within thirty days before the commencement of proceedings by the plaintiff. On the 29th September, 1909, the Court directed that the judgment pronounced as above should not be entered, and that in

lieu thereof an order should be made dismissing the appeal, and confirming the plaintiff's judgment, with costs up to the reference; the plaintiff, however, to pay the costs of the reference, the appeal to the Divisional Court, and the motion to re-open. In the event of the defendants not being satisfied to accept this judgment, the Court directed a reference back to the referee to take the new evidence; the costs of such reference to abide the event.]

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Oct. 8.

Covenant—Restraint of Trade—Breach—Liquidated Damages—Penalty—Actual Damage—Injunction.

In consideration of the purchase by the plaintiffs from the defendants of part of the stock in trade of a hardware business carried on in a village, the defendants covenanted with the plaintiffs that they (the defendants) would not carry on the business of hardware merchants in the village or elsewhere within five miles thereof for a period of ten years, etc.; and for the due performance of the agreement, the parties agreed that \$500 should be the measure of damages for the breach thereof, and that that sum should be recoverable by the plaintiffs as liquidated damages and not as a penalty:—

Held, that, notwithstanding the use of the words "liquidated damages," the \$500 was a penalty; and for breach of the covenant the plaintiffs were entitled only to the actual damage sustained and to an injunction against further breaches of the agreement.

Judgment of the County Court of Essex reversed.

APPEAL by the defendants from the judgment of McHUGH, Judge of the County Court of Essex, dated the 4th June, 1909.

The action was brought in the County Court to recover \$500 damages for breach of a contract.

Under an agreement dated the 30th April, 1909, the plaintiffs purchased from the defendants part of the stock in trade of a hardware and tinware business carried on by the defendants in the village of Harrow, in the county of Essex, the defendants covenanting as follows: "In consideration of the said purchase, the said vendors covenant to and with the said purchasers that they or either of them will not carry on the business of hardware

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and tinware merchants in their own name or in the name of any other person or persons, or act directly or indirectly as partners or assistants to or with any other hardware or tinware merchant carrying on business in the police village of Harrow or elsewhere within five miles thereof within ten years from this date, nor will sell any of the remainder of their stock to any person or persons not now in the hardware business in the police village of Harrow, and will close their doors from and after this date. And for the due performance of this agreement the said parties agree that the sum of \$500 shall be the measure of damages for the breach thereof, and the said sum shall be recoverable by the said purchasers from the said vendors as liquidated damages and not as a penalty."

The plaintiffs alleged a breach in that the defendants had made certain sales to others than those engaged in the hardware and tinware business in Harrow, and that they had not "closed their doors;" and claimed the \$500 as liquidated damages.

The County Court Judge found that the defendants had made two sales of hardware, and that this constituted carrying on business in breach of the agreement. One of these sales was \$16.90 worth of hardware from the defendants' store in Harrow to a blacksmith in the village. In the other case, the defendants having removed to Niagara Falls, one Affleck, a resident of Harrow, wrote them for some fence hooks, and got these from them, together with a saddle and some hose, the price of all being \$15.

The County Court Judge gave judgment in favour of the plaintiffs, awarding them \$500 as liquidated damages, and saying in his reasons for judgment: "The rule of law deducible from the authorities seems to be that where a sum is made payable by way of compensation on the happening of one or more of several events, some of which may occasion serious and others trifling damages, the presumption is that the parties intended the sum to be paid to be penal; but, where such amount is in respect to a single obligation, it is liquidated damages. The stipulations regarding sale and closing doors are not separate covenants, but are incidental to the single covenant against

carrying on business." He concluded, therefore, that the \$500 was liquidated damages, and gave judgment accordingly.

From this judgment the defendants appealed.

The appeal was heard on the 8th October, 1909, by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

A. H. Clarke, K.C., for the defendants. The \$500 is a penalty: *Magee v. Lavell* (1874), L.R. 9 C.P. 107; *Townsend v. Toronto Hamilton and Buffalo R.W. Co.* (1896), 28 O.R. 195; *Law v. Local Board of Redditch*, [1892] 1 Q.B. 127; *Willson v. Love*, [1896] 1 Q.B. 626; *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda*, [1905] A.C. 6; *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; *Leake on Contracts*, 5th ed., p. 770 *et seq.*; *Chitty on Contracts*, 1909 ed., p. 815 *et seq.*; *Wallis v. Smith* (1882), 21 Ch.D. 243; *Brown v. Taggart* (1853), 10 U.C.R. 183.

E. S. Wigle, for the plaintiffs. This is a mixed question of law and fact, and, the County Court Judge having found for the plaintiffs, his finding should not be disturbed. The \$500 is liquidated damages, and not a penalty; the parties in their agreement name it so: *Craig v. Dillon* (1881), 6 A.R. 116; *McNamara v. Skain* (1892), 23 O.R. 103; *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda*, [1905] A.C. 6; *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710; *Price v. Green* (1847), 16 M. & W. 346.

Clarke, in reply.

At the close of the argument the judgment of the Court was delivered by FALCONBRIDGE, C.J.:—Notwithstanding the use of the words "liquidated damages" in the agreement, we think this is a case of penalty.

I find the law very clearly laid down in the Encyclopædia of the Laws of England, vol. 4, at p. 325, as follows: " 'Liquidated damages,' as contrasted with 'penalties,' denotes the sum which the parties to a contract have themselves agreed on as the damages which would be a fair compensation for the breach of it; whereas a penalty is the sum named in a contract to secure its due performance, not as an agreed valuation of the probable

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consequences of its breach, but as an amount to be forfeited on any breach, however great or small the actual loss to the plaintiff may prove to be. Formerly the Courts strictly enforced the penalty, but allowed the defendant by paying the penalty to purchase the right to do the thing which he had promised not to do. Now the tendency of our Judges is to restrict the amount to be paid by the defendant to the damage which the plaintiff has in fact sustained, but at the same time (in a proper case) to grant the plaintiff an injunction to restrain any repetition of the act. The fact that the parties state expressly in their contract that the sum named is liquidated damages, and not a penalty, will not prevent the Court's deciding that it is a penalty (*Thompson v. Hudson* (1896), L.R. 4 H.L. 1, at p. 30; *In re White and Arthur* (1901), 84 L.T. 594; *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda*, [1905] A.C. 6; *Diestal v. Stevenson*, [1906] 2 K.B. 345; *Commissioner of Public Works v. Hills*, [1906] A.C. 368). Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them, then, although it be called by the name of liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable (*Magee v. Lavell*, L.R. 9 C.P. 107; and see *Wallis v. Smith* (1882), 21 Ch.D. 243; *Willson v. Love*, [1896] 1 Q.B. 626; *Jones v. Hough* (1879), 5 Ex.D. 115; *Rayner v. Rederiakliebolaget Condor*, [1895] 2 Q.B. 289). But where the parties name a sum which is to be paid as liquidated damages in one event only, this will be regarded as liquidated damages and not a penalty, and will then bind both parties (*Lea v. Whitaker* (1872), L.R. 8 C.P. 70; *Law v. Local Board of Redditch*, [1892] 1 Q.B. 127; *Strickland v. Williams*, [1899] 1 Q.B. 382).''

But the action will lie for the actual damage sustained. So the County Court has jurisdiction, when the actual amount is considered. We think the plaintiffs have proved damages, which we assess at \$5, and they should have judgment for that amount, and also an injunction against further breaches of the agreement. As the action is really to establish a right, the plaintiffs should have their costs of action on the County Court scale. But the judgment is wrong, and it was proper to take the appeal which

the plaintiffs have opposed. The defendants should have their costs of appeal; these costs to be set off against the plaintiffs' costs and damages, and the balance paid to the party entitled. If necessary the pleadings are to be so moulded as to form the basis for this.

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[DIVISIONAL COURT.]

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Malicious Prosecution—Non-responsibility of Defendants—Evidence—Non-suit—Malicious Issue and Execution of Search Warrant—Advice and Direction of Solicitor and Crown Attorney—Facts Laid before Advisers—Conflict of Evidence—Question for Jury.

The defendants, wholesale merchants, laid an information against O., a salesman in their employment, charging him with the theft of goods which he had sold to the plaintiffs at low prices. O. being brought before a police magistrate, the defendants gave evidence, and O. was committed for trial. The magistrate directed the Crown Attorney to summon S. R. W., one of the plaintiffs, on a charge of unlawfully receiving stolen goods. A formal information was then sworn to by a detective on the direction of the Crown Attorney, and a summons served on S. R. W.; the information was afterwards amended so as to include the other plaintiff; and both plaintiffs were committed for trial on the charge of unlawfully receiving stolen goods. The Crown authorities, instead of laying before the grand jury indictments for theft and receiving, indicted the plaintiffs and O. jointly for conspiracy to defraud the defendants; the grand jury at the Sessions returned a true bill; at the trial all the accused were found not guilty. Otherwise than by an acquittal on the indictment for conspiracy, the original charges of theft and receiving were not disposed of.

On the information for theft being laid, the defendant A. laid an information before a justice charging that a quantity of his goods had been stolen, and that he suspected that the same were concealed in the premises of the plaintiffs, upon which a search warrant was issued and placed in the hands of a detective, who, with the defendant A., went to the plaintiffs' premises and seized and took away all the goods which the defendants alleged had been stolen by O. The defendants' solicitor accompanied A. to the justice when the warrant was obtained, and the Crown Attorney approved of the warrant being issued upon the statements made by A. and the solicitor.

In actions for malicious prosecution and for maliciously and wrongfully causing a search warrant to be issued and the premises and property of the plaintiffs to be searched and the plaintiffs' goods to be seized and taken away:—

Held, as to the claims for malicious prosecution, that the defendants were not responsible for the first prosecution because it was the result of a direction by the magistrate, given without any request or suggestion by the defendants, and were also not responsible for the conversion of the original charge into a charge of conspiracy. Otherwise than by giving their evidence as Crown witnesses, the defendants in no way aided or

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encouraged the prosecution of the plaintiffs, and their depositions before the magistrate merely disclosed that O., without authority, sold the goods to the plaintiffs at greatly reduced prices; there was nothing in the defendants' evidence inconsistent with the innocence of the plaintiffs, and therefore nothing properly to influence the magistrate in directing the plaintiffs to be charged with a crime.

Fitzjohn v. Mackinder (1861), 9 C.B.N.S. 505, distinguished.

Judgment of FALCONBRIDGE, C.J.K.B., on this branch of the case, affirmed.

Held, as to the claims based on the issue and execution of the search warrant, that, as the evidence of the plaintiffs and defendants was in conflict upon a number of points, and, if the evidence of the plaintiffs and O. was accepted, there were several important facts which the defendants did not submit to their solicitor or to the Crown Attorney, it should have been left to the jury to find whether the defendants did lay all the facts of their case fairly before counsel, and whether they acted *bonâ fide* upon the advice given, and also whether the goods were in fact sold at less than their value.

Judgment of FALCONBRIDGE, C.J.K.B., on this branch of the case, reversed. An action lies for wrongfully issuing and executing a search warrant.

Seemle, that issuing a search warrant is not a mere ministerial but a judicial act of the justice, and the warrant in this case was illegally obtained and might have been quashed by reason of the fact that the information did not disclose facts and circumstances shewing the causes of suspicion. *Rex v. Kehr* (1906), 11 O.L.R. 517, specially referred to.

AN appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., dismissing actions brought by two plaintiffs, husband and wife, against the Anderson & Macbeth Co. Limited, wholesale merchants, and George Anderson, president of the company, for malicious prosecution and for maliciously and wrongfully causing a search warrant to be issued and the premises and property of the plaintiffs to be searched and the plaintiffs' goods seized and taken away.

The actions were tried together, with a jury, at Toronto. The trial Judge, at the conclusion of all the evidence, nonsuited the plaintiffs, ruling that they had failed to establish want of reasonable and probable cause.

January 25, 1909. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

I. F. Hellmuth, K.C., and *Neil Sinclair*, for the plaintiffs. The actions here are of a threefold character: (1) for maliciously and wrongfully causing a search warrant to be issued; (2) for malicious prosecution; and (3) for trespass. No doubt there was conflicting evidence as to the circumstances in which the search warrant was issued, but, assuming the evidence submitted on behalf of the plaintiff Sarah R. Willinsky to be

true, this would justify a finding in her favour. The jury must pass on the facts, and when the evidence is conflicting it must be submitted to them. The jury find the facts; and the Judge determines whether the facts so found constitute reasonable and probable cause: *Still v. Hastings* (1907), 13 O.L.R. 322, 14 O.L.R. 638. The search warrant was issued on the information of the defendants that the goods had been stolen and concealed on the plaintiffs' premises. The evidence shewed that they were not stolen, but were purchased by the plaintiffs in good faith and at a fair price, and there was no concealment or attempt at concealment; and, moreover, all the facts were not disclosed. A search warrant should be issued only after a full and fair disclosure of all the facts. The justice has a judicial duty to perform, and must decide on all the facts: *Hope v. Evered* (1886), 17 Q.B.D. 338. As to the claim for malicious prosecution, the defendants cannot escape liability by attempting to throw the onus on the Crown. They set the law in motion, and are therefore responsible: *Fitzjohn v. Mackinder* (1861), 9 C.B.N.S. 505; Newell on Malicious Prosecution, p. 109. As to the claim for trespass, the evidence shews that there was a removal of other goods than those alleged to have been fraudulently sold to the plaintiffs.

H. H. Dewart, K.C., for the defendants. The defendants never laid any charge against either of the plaintiffs. The charge was laid against Owens, the defendants' clerk. The search warrant was only issued in aid under sec. 629 of the Criminal Code, R.S.C. 1906, ch. 146. The defendant Anderson acted in good faith, believing the information furnished him to be true. He also acted as a prudent man would do. He consulted his solicitor, and they both went before the proper authorities, and were advised to lay the information on which the search warrant issued. The word "concealment" does not mean concealment in the sense attributed to it, namely, "hidden." All it means is that there were goods on the premises, which were the subject of the charge preferred against Owens. The defendants merely followed the form given in the Code, form 2. Malicious prosecution will not lie. The defendants had nothing to do with the charge preferred against the plaintiffs. This was at the instance of the Crown, and there is nothing

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to justify the assertion that the defendants set the law in motion. There was no termination of the proceedings. They were merely allowed to drop: *Baxter v. Gordon Ironsides and Fares Co. Ltd.* (1907), 13 O.L.R. 598. The trespass claim was passed on by the trial Judge, and his finding should not be interfered with.

September 21. The judgment of the Court was delivered by TEETZEL, J.:—The plaintiff Sarah R. Willinsky carries on business as a merchant in Toronto, and the plaintiff M. L. Willinsky is her husband, who assists in the business.

The action by each plaintiff is for malicious prosecution and for maliciously and wrongfully causing a search warrant to be issued and the premises and property of the plaintiffs to be searched and the plaintiffs' goods to be seized and taken away.

The defendants are wholesale merchants, and on or about the 5th November, 1907, they laid an information against one Harry Owens, a salesman in their employment, charging him with theft of a quantity of goods which he had sold to the plaintiff M. L. Willinsky, acting for his wife.

The ground for the charge of theft appeared to be that Owens had without authority sold one lot of goods for \$5.70, which, the defendants allege, should have been sold for \$70.80, and another lot for \$43. which, the defendants say, should have been sold for over \$200.

The evidence for the plaintiffs shewed that the goods had depreciated in value and were what is known as "job" lots, and were not worth more than the plaintiffs agreed to pay.

The goods were sold on credit and charged in the defendants' books to the female plaintiff.

The charge against Owens came before the police magistrate on the 21st November, 1907, when Owens was committed for trial. Both the defendants* gave evidence, and either during or at the close of the investigation the police magistrate gave a direction to Mr. Corley, the Crown Attorney, to summon the female plaintiff on a charge of unlawfully receiving stolen goods.

*That is, the defendant Anderson and Mr. Macbeth, the vice-president of the defendant company.

The formal information or charge was, on the direction of the Crown Attorney, sworn to by William Newton, a member of the city detective force, on the 22nd November, 1907.

A summons upon this charge was thereupon served upon the female plaintiff, and, when it came before the police magistrate upon the 28th November, the information was amended so as to include the male plaintiff. Both plaintiffs were committed for trial on the charge of unlawfully receiving stolen goods.

Instead of laying before the grand jury indictments for theft and for receiving stolen goods, Mr. Drayton, Crown Attorney, after conferring with Judge Winchester, as Chairman of the Court of General Sessions of the Peace, indicted the plaintiffs and Owens jointly for conspiracy to defraud the defendants. The grand jury returned a true bill.

At the trial all the accused were found not guilty. Otherwise than by an acquittal on the indictment for conspiracy, the original charges of theft and of receiving stolen goods were not disposed of.

On the information for theft being laid against Owens or immediately thereafter, the defendant Anderson laid an information before a justice of the peace charging that a quantity of his goods had been stolen, and that he suspected that the same were concealed in the premises of the plaintiff Sarah R. Willinsky, upon which a search warrant was issued and placed in the hands of a detective, who, with the defendant Anderson, went to the plaintiffs' premises and seized and took away all the goods which the defendants alleged had been stolen by Owens. The plaintiffs assert that other goods were also taken which had not been purchased from the defendants, and have not been returned.

The defendants' solicitor accompanied Anderson to the justice of the peace when the warrant was obtained, and the evidence also shews that Mr. Corley, the Crown Attorney, approved of the warrant being issued upon the statements made by Anderson and Mr. Maw, his solicitor.

Mr. Maw gives this explanation about the warrant: "We had not the goods which we were charging Owens with the theft of, they had been delivered to Willinsky's premises, and we required them to prove our charge."

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“Q. Was there any other way which you knew of in which you could have got them? A. No, only Mr. Anderson told me he had been down and had seen them and knew they were there.”

And Mr. Corley says: “I was asked for a search warrant in aid to obtain the evidence, and I thought it was necessary and material.”

“Q. And, after the facts had been stated to you, did you authorise the issue of the search warrant? A. Yes, after what facts were stated to me, I did.”

At the close of the plaintiffs' case, Mr. Dewart, for the defendants, moved for a nonsuit; the learned Chief Justice then declined to grant the motion, but gave effect to it at the close of all the evidence, the plaintiffs being allowed to withdraw their claim for damages for the goods taken under the warrant which had not been bought from Owens, and to sue for the same in the Division Court.

In granting the nonsuit, the learned Chief Justice was of opinion that the plaintiffs had failed to establish want of reasonable and probable cause with reference both to the search warrant and to the proceedings before the police magistrate and at the Sessions.

As to all the proceedings, other than the search warrant, he was of the opinion that the defendants were not responsible, because they were instituted solely by the Crown authorities and not by the defendants.

As to the actions for malicious prosecution, I fully agree with the learned Chief Justice that the defendants are not responsible, because the first prosecution complained of was clearly, upon the evidence, the result of a direction by the police magistrate, which was given without any request or suggestion by either of the defendants. And it is equally clear that they were in no way responsible for converting the original charge into a charge for conspiracy.

Otherwise than by giving their evidence as Crown witnesses, it cannot be said that the defendants in any way aided or encouraged the prosecution of the plaintiffs. Their evidence before the jury was not produced at the trial, but, assuming that it went no further than the evidence before the police

magistrate, nothing was said by either of the defendants inconsistent with the innocence of the plaintiffs. Their depositions before the magistrate merely disclosed that Owens, without authority, sold the goods to the plaintiffs at greatly reduced prices.

The transactions in question were entered in the defendants' books, and the goods were charged, at the prices agreed on, in the plaintiffs' account, and there was not a tittle of evidence to shew that the plaintiffs had any reason to suspect that Owens was exceeding his authority in agreeing upon the prices charged to the plaintiffs, nor anything to indicate that there had been any improper dealing or understanding between the plaintiffs and Owens, or anything from which a guilty knowledge could be imputed to the plaintiffs, other than the fact that they were getting a quantity of goods at greatly reduced prices, which, while possibly a circumstance of suspicion, would not be sufficient to warrant a criminal charge being made against the plaintiffs.

The absence of anything in the evidence of the defendants before the police magistrate inconsistent with the plaintiffs' innocence, distinguishes this case from *Fitzjohn v. Mackinder*, 9 C.B.N.S. 505. In that case the defendant had sued the plaintiff in the County Court for a debt, in which action the plaintiff claimed a set-off, in answer to which the defendant produced his ledger containing an acknowledgment signed, as he swore, by the plaintiff. The plaintiff denied his signature, which he averred to be a forgery; but the Judge, induced partly by the statement of the defendant and partly by the conduct of the plaintiff before him, disbelieved the plaintiff's denial, and committed him for trial for perjury; on the trial he was acquitted, and thereupon sued the defendant for malicious prosecution. It was held that the action was maintainable, the committal of the plaintiff and his prosecution for perjury being the result of the wrongful and malicious act of the defendant.

The distinguishing feature of that case from the present is that the false evidence of the defendant and the production of the forged receipt in the action between him and the plaintiff influenced the Judge in directing the arrest. In the present case, as I have already pointed out, there was nothing in the defendants' evidence inconsistent with the innocence of the

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plaintiffs, and therefore nothing to properly influence the magistrate in directing the plaintiffs to be charged with a crime.

While agreeing that, so far as respects the claims for malicious prosecution, the actions were properly dismissed, I am, with great respect, unable to agree that the plaintiffs' claims for damages by reason of the search warrant should have been dismissed. The learned Chief Justice was of the opinion that there was not an absence of reasonable and probable cause, as regards all the proceedings by reason of the evidence that the defendants acted on the advice of their solicitor, and as to the search warrant also upon the authority of Mr. Corley.

The evidence of the plaintiffs and the defendants was in conflict upon a number of points of importance, and, if the evidence of the plaintiffs and Owens was accepted, there were several important facts which the defendants did not submit either to their solicitor or to Mr. Corley. For instance, Owens swore that he was acting in all respects within the scope of his authority in agreeing upon the prices with Willinsky, also that Macbeth* introduced Willinsky to him on the 19th September (date of first alleged criminal act). As to this Owens says:—

“Q. How did you become acquainted with him (Willinsky)? Who brought you together, if anybody? A. Mr. Macbeth.

Q. How was that? What took place? A. I think Mr. Willinsky came into the warehouse. I asked Mr. Macbeth if it was all right to sell to him.

Q. What did Mr. Macbeth say? A. Mr. Macbeth came down and told me it was all right to sell to him, but, he says, he was a hard man to sell.”

This conversation was also sworn to by Willinsky, but entirely contradicted by Macbeth.

Owens also gave evidence that the entries in the books were in accordance with the practice of the warehouse in the sales of job lots. This was also contradicted by the defendants, but the books to some extent corroborated Owens.

None of these facts appear to have been submitted to either the defendants' solicitor or to Mr. Corley.

There was also great conflict of evidence as to the actual value of the goods.

*Vice-president of the defendant company.

In view of the very contradictory character of the evidence, I think it should have been left to the jury, so far as respects the search warrant, to find whether the defendants did "lay all the facts of their case fairly before counsel, and whether they acted *bonâ fide* upon the advice given:" see *Ravenga v. Mackintosh* (1824), 2 B. & C. 693; and also whether the goods were in fact sold at less than their value.

These are surely questions of fact not within the province of the trial Judge to determine upon conflicting evidence.

It is well settled law in actions of this kind that if there are facts in dispute the jury must pass upon those facts before the Court can say whether reasonable and probable cause is or is not absent.

The functions of Judge and jury in malicious prosecution actions were fully discussed in *Still v. Hastings* (1907), 13 O.L.R. 322, where the leading authorities are reviewed.

There was also evidence that before the information for search warrant the defendant Anderson visited the plaintiffs' premises and saw the goods in question, some of which were exposed for sale and others were in the boxes as sent from the defendants' warehouse, and that there was no attempt made to secrete any of the goods or to prevent the defendants from examining them. This important fact also does not appear to have been submitted to either the solicitor or Mr. Corley.

It is impossible, upon all the evidence, to understand how the defendant Anderson could have knowingly sworn in the information that he had reasonable cause to suspect that the goods were secreted in Mrs. Willinsky's premises. It is also difficult to understand why, instead of putting in force a criminal process, the defendants should not have either replevied the goods or obtained their production under subpœna *duces tecum*.

That issuing a search warrant is not a mere ministerial act, but a judicial act of the justice of the peace, is to be implied from the judgment in *Rex v. Kehr* (1906), 11 O.L.R. 517, where it was held that the proceedings on which a search warrant is issued, and the warrant itself, may be brought before the Court on *certiorari*, and, if the warrant is deemed to have been improperly issued, it may be quashed.

Upon the authority of that case, it would also appear that

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the warrant in this case was illegally obtained and might have been quashed, by reason of the fact that the information does not disclose facts and circumstances shewing the causes of suspicion upon which the application for search warrant was based, and which are required by sec. 629 of the Criminal Code.

That an action will lie for wrongfully issuing and executing a search warrant appears to be well settled. See cases cited in Stephen on Malicious Prosecution, pp. 7, 8, and 24; Clerk & Lindsell's Law of Torts, 4th ed., pp. 642-3; and particularly *Elsee v. Smith* (1822), 1 D. & R. 97; *Grainger v. Hill* (1838), 4 Bing. N.C. 212; *Hope v. Evered*, 17 Q.B.D. 338. See also *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674.

In the result, therefore, I would direct judgment to be entered dismissing the appeal so far as respects the claims of both plaintiffs for damages for malicious prosecution; and allowing the appeal of the plaintiff Sarah R. Willinsky in respect of her claim for damages arising out of the issue and execution of the search warrant, and directing a new trial as between her and the defendants upon that claim.

Success being divided, there should be no costs of the former trial or of this appeal.

E. B. B.

[IN CHAMBERS.]

REX v. VAN NORMAN.

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Municipal Corporations—Hawkers and Peddlers—County By-law for Licensing—Magistrate's Conviction—Municipal Act, 1903, sec. 583 (14)—6 Edw. VII. ch. 34, sec. 26 (O.)—Bonâ Fide Servant of Manufacturer—Onus—Finding of Magistrate—Uncontradicted Evidence—Review on Motion to Quash Conviction—Sale to Retail Traders—"Hawkers"—Evidence Disclosing only one Sale—Going from Place to Place—Validity of By-law—License Fees Specified for Certain Classes—Towns in County—Penalty, Division of—Reward.

The defendant was tried before a justice of the peace on an information charging a violation of a by-law of a county by selling stoves without a peddler's license. The defendant produced what he alleged to be an agreement with a foundry company carrying on business in Ontario, and said that he was manager and agent for the company, and that the goods which he sold were the manufacture of the company. The magistrate came to the conclusion that the defendant was a purchaser from the company, and that the agreement was not *bonâ fide*; and the defendant was accordingly convicted. On a motion to quash the conviction:—

Held, that under sec. 583 (14) of the Consolidated Municipal Act, 1903, as amended by 6 Edw. VII. ch. 34, sec. 26 (O.), the onus was upon the defendant of satisfying the magistrate that he did not come within the general provisions of sec. 583 (14), but did come within the proviso that no license should be required for peddling to any retail dealer any goods the manufacture of this Province by the *bonâ fide* servants of the manufacturer having written authority in that behalf; and, although there was no evidence contradicting the testimony of the document and the evidence of the defendant, the magistrate was not bound to accept the evidence, for there is no rule in our law that a trial tribunal must accredit any witness, even when not contradicted.

2. The definition of "hawkers" given in sec. 583 (14) (a) is not, and is not intended to be, exhaustive.

3. Though the defendant made only one sale, he went from place to place with horses and conveyances drawing certain ranges for sale, and that was what the statute and by-law forbade.

4. A by-law may be attacked upon a motion to quash a conviction.

5. Although sec. 1 of the by-law contained an express prohibition against peddling, etc., by all persons without a license, and sec. 2 provided only for four classes of persons receiving licenses, yet any one desiring to peddle was entitled to a license, and, the fees for such license being fixed in the by-law for certain classes of persons only, the county could not refuse a license to other classes, or require a license fee to be paid therefor; the defendant came within the classes named, and did not complain that he was refused a license.

6. The by-law purported to relieve any town in the county not separate for municipal purposes from the county from the necessity of declaring in a by-law passed by the town that the county by-law was not to be in force:—

Held, that, if the county had no power to make such a provision, the provision was a mere nullity, and did not affect the validity otherwise of the by-law.

7. Section 7 of the by-law provided that one-half of every penalty levied under the provisions of the by-law should go to the informer and the other half to the county treasurer, etc. This was complained of as being contrary to sec. 708 of the Consolidated Municipal Act, 1903:—
Held, that, if the clause was not valid, there was no provision for the

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division of the penalty, and sec. 708 applied to the fullest extent; the defendant was not interested in the application of the fine.
 s. By sec. 8 of the by-law the county treasurer was authorised, in a certain event, "to pay to the party receiving the conviction the sum of \$10:"
 —Held, that this might be *ultra vires* of the county council; but the defendant was not affected.

MOTION by the defendant to quash his conviction by a magistrate for an offence against a by-law of the county of Grey, as set out in the judgment.

The motion was heard by RIDDELL, J., in Chambers, on the 28th and 29th September, 1909.

W. E. Raney, K.C., for the defendant.

W. E. Middleton, K.C., for the prosecutor and the magistrate.

October 1. RIDDELL, J.:—Van Norman and others were tried before a justice of the peace upon informations charging a violation of by-law 726 of the county of Grey by selling stoves and ranges without a peddler's license.

The by-law is set out at length in a later part of this judgment.

Van Norman produced what he alleges to be an agreement with the Western Foundry Co., (Ltd.), of Wingham, and said that he was simply manager and agent for that company, that the others were hired by him as agents for the company—and, as the goods which they sold were the manufacture of that company, he contended that he should not be obliged to take out a license.

The magistrate, as he says in writing, came to the conclusion that Van Norman and the others were actually purchasers from the company, and that the agreement was not *bonâ fide*. Van Norman was accordingly convicted.

Upon motion to quash the conviction many grounds were urged by Mr. Raney for the defendant:—

1. By sec. 583(14) of the Consolidated Municipal Act, 1903, the councils (*inter alia*) of counties are given power to pass by-laws for licensing, etc., hawkers, peddlers, etc.: "Provided always that no such license shall be required for hawking, peddling or selling from any vehicle . . . to any retail dealer, or for hawking . . . any goods . . . the growth, pro-

duce or manufacture of this Province . . . if the same are being hawked or peddled by the manufacturer or producer of the goods . . . or by his *bonâ fide* servants or employees having written authority in that behalf . . .” The defendant contends that he comes within this proviso as being the *bonâ fide* servant and employee of the manufacturers of these goods.

In my opinion as at present advised, if effect were to be given to the documents produced, this claim would be made out. But he must prove that he comes within the exception.

Section 583(14) is amended by the Ontario Act 6 Edw. VII. ch. 34, sec. 26, which provides that where the defence is set up that the person charged is the *bonâ fide* servant or employee of the manufacturer or producer of the goods, the onus of proving that he comes within such defence shall rest upon him, “and in the event of his failing to establish at the trial that he does come within such defence he may be convicted of a violation of this sub-section.” A general provision of much the same character is to be found in the Dominion Act of 1909, 8 & 9 Edw. VII. ch. 9, schedule 2, at p. 110, which repeals sec. 717 of the Code in the Revised Statute and substitutes a new section.

The defendant took and must needs take upon himself the onus of satisfying the magistrate that he did not come within the general provisions of the statute, but did come within the proviso. It is quite true that there is no evidence contradicting the testimony of the document and the evidence of Van Norman, but there is no rule in our law that a Judge or jury or other trial tribunal must accredit any witness, even although not contradicted.

In a number of the States of the neighbouring Union there have been *dicta*, if not decisions, to the effect that the uncontradicted evidence of a disinterested witness must be accepted. An interesting article upon that question will be found in the Law Notes for November, 1906, p. 147, which I do not quote, as the Courts there referred to have not binding authority in Ontario, though deserving of all respect. Wigmore on Evidence, secs. 1010, 2035, and 2489, may be looked at also. But, even

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in these Courts, it has not been considered that the uncontradicted evidence of an interested witness must necessarily be accepted. And in our law no trial tribunal is compelled to credit the testimony of any witness, interested or not. (I am not of course speaking of what an appellate Court would do in the case of an appeal upon the ground that the finding was against the weight of evidence or against evidence.)

Had the defendant appealed, he might have had the evidence weighed, but I am not sitting in appeal from the findings of the magistrate; and I cannot as a matter of law hold that the magistrate should have accepted the evidence of Van Norman. That being so, Van Norman sold goods made by the company, but not as agent or servant or employee: he is, therefore, not within the proviso referred to in that particular.

2. And, while it is not proved that the sale was not made to a retail dealer, the same provisions of the Ontario Act and of the Dominion Act of 8 & 9 Edw. VII. apply.

3. Then it is argued that he does not come within the definition of "hawkers" given in the Consolidated Municipal Act, 1903, sec. 583(14)(a). But that definition is not, and is not intended to be, exhaustive, as the history of the legislation will make clear.

The Act of 1883, sec. 495(3), which had come from 43 Vict. ch. 24, sec. 13, was much the same as the present sec. 583(14), but had not the sub-section (a) now under consideration. In that state of the law, *Regina v. Coutts* (1884), 5 O.R. 644, came on before the late Mr. Justice Rose. That learned Judge held that a traveller for a tea house who carried samples from house to house and took orders which he forwarded to his employers and they sent the tea, was not within the meaning of the word "hawker" in the Act. Thereupon the Legislature at the next session passed the Act 48 Vict. ch. 40, which is substantially the present sub-sec. (a), correcting the statute and making the word include such a person as the defendant in the *Coutts* case.

4. It is contended that the defendant made only one sale, and therefore he is not within the purview of the by-law. But it is admitted that he went from place to place with horses and conveyances drawing certain ranges for sale: and, though the

admission as to sale and exhibiting is said to cover "just one range on one occasion only," I do not find any such limitation as to going from place to place. And that is what the statute and by-law cover: *Regina v. Rawson* (1892), 22 O.R. 467.

The validity of the by-law is attacked on several grounds. No doubt, a by-law may be attacked upon a motion to quash a conviction: *Regina v. Cuthbert* (1880), 45 U.C.R. 19.

The by-law is as follows:—

"BY-LAW No. 726.

"A By-law to License, Regulate, and Govern Hawkers, Pedlars, and Petty Chapmen.

"Whereas it is deemed advisable to provide for the licensing, regulating, and governing of hawkers, pedlars, and petty chapmen doing business in the county of Grey:

"Be it therefore enacted by the council of the municipal corporation of the county of Grey, and it is hereby enacted:

"1. No person shall within the county of Grey act as a pedlar, hawker, or petty chapman, or carry on petty trades, or go from place to place or to other men's houses on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale, or in or with any boat, vessel, or other craft, or otherwise carrying goods, wares, or merchandise for sale, without having first obtained a license to do so, in the manner hereinafter mentioned:

"Provided always that no such license shall be required for hawking, peddling, or selling from any vehicle or other conveyance any goods, wares, or merchandise, to any retail dealer, or for hawking or peddling any goods, wares, or merchandise, the growth, produce, or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of the goods, wares, or merchandise, or by his *bonâ fide* servants or employees having written authority in that behalf; and such servants or employees shall produce and exhibit his written authority when required so to do, by any municipal or peace officer; And provided also that nothing herein contained shall affect the powers of any council to pass

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by-laws under the provisions of sections 579 and 582 and clause 30 of section 583 of the Consolidated Municipal Act of 1903; and provided also that nothing herein contained shall apply or be in force in any town in the county of Grey not separate from such county for municipal purposes, while a by-law of such town to carry into effect the purposes or objects of clause 14 of the said section 583 of the Consolidated Municipal Act of 1903 remains in force.

“(A) The word ‘hawkers’ in this section of the by-law shall include all persons who, being agents for persons not residents within the county of Grey, sell or offer for sale tea, dry goods, watches, platedware, silverware, furniture, carpets, upholstery, millinery, or jewellery, or carry and expose samples or patterns of any such goods to be afterwards delivered within the county, to any person not being a wholesale or retail dealer in such goods, wares, or merchandise.

“2. Any person desiring a license enabling him to act as a hawker, pedlar, petty chapman, or otherwise, as in section 1 of this by-law mentioned, shall first pay to the county treasurer of the county of Grey, for the general uses of the county, for licenses required under this by-law as follows: the sum of \$125 for a license for a person using a two-horse waggon or vehicle; the sum of \$100 for a license for a person using a one-horse waggon or vehicle; the sum of \$60 for a license for a person using a waggon or cart or other conveyance drawn or pushed by the person; and the sum of \$50 for a license for a person travelling on foot and carrying a pack, box, bundle, basket, or valise. And the county treasurer is hereby authorised and required, upon payment being made of the proper fee, to issue a license to any such person applying therefor, to license such person to act as a hawker, pedlar, or petty chapman, or otherwise, as in section 1 of this by-law mentioned, within the county of Grey.

“3. Every person who has obtained a license under the provisions of this by-law shall at all times while carrying on his business have his license with him, and shall, upon demand, exhibit the same; and, upon failing to exhibit the same when demanded, shall, unless the same is accounted for satisfactorily,

be liable to a penalty of not less than \$1, nor more than \$5, for each offence, together with costs, recoverable before a justice of the peace; and it shall be lawful for the justice of the peace convicting as aforesaid to order that in default of payment the offender be committed to the common gaol of the county of Grey, there to be imprisoned for any time, in the discretion of the convicting justice, not exceeding 20 days, and with or without hard labour, unless such penalty and costs, including the costs of the committal and conveyance of the offender to the common gaol, are sooner paid.

“4. All licenses issued under this by-law shall be in force for one year from the date of the issuing thereof, and shall be under the corporate seal of the county, and shall be signed by the county treasurer.

“5. The county treasurer shall, not later than the first day of May and the first day of November in each year, prepare a list of the parties who have taken out licenses under this by-law, together with their respective post office addresses; and the county clerk shall have a sufficient number of such lists printed and distributed throughout the county to all county constables, postmasters, and justices of the peace within the county of Grey.

“6. Every person guilty of a breach of any of the provisions of this by-law, excepting as provided for in section 3 of this by-law, shall, upon conviction, before any justice of the peace having jurisdiction in the premises, forfeit and pay, at the discretion of the said justice of the peace making such conviction, a penalty not exceeding the sum of \$50, nor less than \$20, for each offence, exclusive of costs; and it shall be lawful for the justice of the peace convicting as aforesaid to order that in default of payment of such penalty and costs forthwith, or within a time limited by such justice of the peace, such penalty and costs shall be levied by distress and sale of the goods and chattels of the offender, and to issue a warrant of distress therefor, and to order that, if sufficient distress cannot be found out of which such penalty can be levied, the offender be imprisoned in the common gaol of the county of Grey, with or without hard labour, for any period not exceeding 21 days, unless the said penalty and costs, including the costs of the distress and of the

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committal and conveyance of the offender to the said gaol, are sooner paid, and to issue a warrant of committal therefor.

“7. One half of every penalty levied under the provisions of this by-law shall go to the informer or prosecutor, and the other half to the county treasurer, unless the prosecution is brought in the name of the corporation of the county of Grey, in which case the whole of the penalty shall be paid to the county treasurer.

“8. In the event of there not being sufficient distress out of which the costs of said prosecution can be procured, the county treasurer is hereby authorised to pay to the party securing the conviction the sum of \$10, on the certificate of the justice of the peace making the conviction—but this shall not apply to the high constable of the county.

“9. All by-laws heretofore passed by this council relating to hawkers, pedlars, and petty chapmen, be and the same are hereby repealed.

“10. This by-law shall come into force and take effect on, from, and after the passing thereof.”

5. It is contended that sec. 1 of this by-law contains an express prohibition against peddling, etc., by all persons without a license; and that sec. 2 provides only for certain persons receiving a license, that is, only those using: (1) a two-horse waggon or vehicle; (2) a one-horse waggon or vehicle; (3) a waggon or other conveyance drawn or pushed by the person; and (4) those travelling on foot and carrying a pack, etc. The argument is that many persons not coming within any of these four classes might be desirous of peddling, etc., and would be prevented absolutely by reason of the fact that there is no provision for granting such persons a license. One might wish to cover the territory, or part of it, by automobile, or four-in-hand, or boat, for example. But this argument does not appear to me to be sound. It seems to me that any one desiring to peddle is entitled to a license, and that, the fees for such license being fixed in the by-law for certain classes of persons only, the county could not refuse a license to other classes, or require a license fee to be paid therefor. It must not be forgotten either, that the defendant

here does come within the classes named, and does not complain that he was refused a license.

6. The proviso in respect of towns in the county not separate for municipal purposes from the county, it is said, is not precisely the same as sec. 583(14)(c). It is quite true that the present by-law purports to relieve such a town from the necessity of declaring in a by-law passed by such town that the county by-law is not to be in force; and it may be that the county has no power to make such a provision. If so, the provision is a mere nullity, and does not affect the validity otherwise of the by-law—and in any event this is not a case of such a town. That part of a by-law may be invalid without affecting the validity of another part is, of course, well recognised. *In re Fennell and Corporation of Guelph* (1865), 24 U.C.R. 238, furnishes a striking example of this principle.

7. Section 7 of the by-law is then complained of as being contrary to sec. 708 of the Consolidated Municipal Act, 1903. Assuming that “the pecuniary penalty . . . levied under this Act” is the pecuniary penalty imposed by a by-law passed under the authority of this Act, I cannot see that the defendant is advanced. If the clause is valid, *cadit questio*: if not, there is no provision for the division of the penalty, and sec. 708 applies to the full extent. In either case the defendant is not interested: he pays his fine to the justice of the peace, and the justice of the peace must apply it legally.

8. Section 8 is also attacked as being in effect an offer of a reward to the party securing the conviction. In some instances this would or might be so: and it may be that this section is *ultra vires* of the county council. *Cornwall v. Corporation of West Nissouri* (1875), 25 C.P. 9, decides that the municipality cannot legally pay a reward for the apprehension of criminals—unless indeed that be authorised by statute. Certain bounties and rewards are authorised by the Act, secs. 592 to 595, but the Legislature has not yet given power to municipalities to put peddlers who sell without a license upon the same footing as wolves or horse thieves, however obnoxious such vendors may be in the view of the members of a municipal council. But that, again, does not affect this defendant; the

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section now under consideration may be elided from the by-law, and nothing in the present proceedings would be in the least affected.

I have read all the cases cited and others, amongst them: *Rex v. Little* (1758), 1 Burr. 610; *The King v. Buckle* (1803), 4 East 346; *Johnson v. Hudson* (1809), 11 East 180; *The Queen v. Whelan* (1900), 4 Can. Crim. Cas. 277; *Regina v. Chayter* (1886), 11 O.R. 217; *Regina v. Bassett* (1886), 12 O.R. 51; *Regina v. Henderson* (1889), 18 O.R. 144; and see nothing opposed to my present decision.

The by-law might well have been more artistically drawn, but I cannot say that it so invites a motion that costs should be withheld; the motion has no merits and should be dismissed with costs.

NOTE.—The defendant launched an appeal to a Divisional Court, but on the 11th October, 1909, the appeal was quashed upon the ground that no leave to appeal had been obtained.

Application was made to MEREDITH, C.J.C.P., for leave to appeal, and this was refused on the 19th October, 1909.

E. B. B.

[DIVISIONAL COURT.]

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Oct. 14.

Partnership—Dissolution—Retiring Partner—Liability for Debts of Firm—Discharge—Agreement to Accept New Firm as Debtors—Inference from Conduct—Novation—Findings of Fact.

A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Where the liability of the retired partner is one resting not on estoppel only, but the firm of which he was a member is the actual debtor, it is necessary to make out a case of novation in order to discharge the retired partner.

Scarf v. Jardine (1882), 7 App. Cas. 345, distinguished.

The plaintiffs, creditors of a partnership, sought to recover the amount of their debt from a member of the partnership who had retired. Notice of this and of the fact that the business was continued by a new firm under the same name, and that the new firm had assumed and would pay the debts of the old firm, was given to the plaintiffs. The new firm having made an assignment for the benefit of creditors, the plaintiffs proved a claim against the estate in respect of the debt of the old firm, one of the plaintiffs acted as an inspector of the estate, and they received dividends from the assignee. The trial Judge found that the plaintiffs proved their claim forgetting that the dissolution had taken place and under the belief that they were proving it against the old firm, and that the acting as inspector and the receipt of the dividends were under the like belief:—

Held, that the findings of the trial Judge ought not to be disturbed, and that upon them a case of novation was not made out.

Judgment of RIDDELL, J., affirmed.

APPEAL by the defendant Norris from the judgment in favour of the plaintiff pronounced by RIDDELL, J., on the 8th December, 1908, at the trial of the action before him sitting without a jury at Toronto.

The action was brought against the appellant and one Thomas D. Lockhart, against whom the plaintiffs obtained judgment by default, to recover \$608.44 for goods sold and delivered by the plaintiffs to the appellant and Lockhart, who carried on business in partnership as plumbers under the name of Norris & Lockhart, at Galt, and \$13.90 for interest, less \$193.10, for which credit was given, made up of \$50 paid on account on the 10th July, 1906, and two sums of \$71.55 credited as dividends, which were in fact dividends received from the assignee of the estate of Norris &

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Lockhart, a partnership consisting of the defendant Lockhart and Edgar J. K. Norris, a brother of the appellant, to whom they had executed an assignment for the benefit of creditors on the 14th August, 1906.

After this debt was contracted, and on the 1st March, 1906, the partnership between the appellant and Lockhart was dissolved, and a new partnership was formed under the same name, consisting of Lockhart and Edward J. K. Norris, which took over the business of the former partnership and assumed and agreed to pay its liabilities.

Notice of the dissolution was given to the plaintiffs early in March, 1906, and by it they were informed that the appellant had sold out his interest in the business of the firm to his brother, Edward J. K. Norris, who with Lockhart would carry on the business under the name of Norris & Lockhart, and by it the plaintiffs were also informed that the new firm had assumed and would pay all debts, liabilities, and obligations of the old firm.

Notice of the assignment was given to the plaintiffs, and was published in the *Ontario Gazette* and in a Galt newspaper, and in it the assignment was stated to have been made by "Edgar J. K. Norris and Thomas D. Lockhart, of the town of Galt, in the county of Waterloo, carrying on business as plumbers at the said town of Galt under the name, style, and firm of Norris & Lockhart."

At a meeting of the creditors of the new firm, R. J. Cluff, one of the plaintiffs, was appointed one of the inspectors of the estate.

The plaintiffs filed against the estate of the insolvent firm the claim for which they now sued, the affidavit proving it being made not by either of the plaintiffs, but by Miles Macdonald, who was described as their agent, and received from the assignee the two dividends above referred to, one of them on the 22nd October, 1906, and the other on the 28th May, 1907. They also received from the new firm the payment of \$50 for which credit was given.

The defence of the appellant was that the plaintiffs accepted the new firm as their debtors in discharge of their claim against him and the old firm; and he relied upon the payment of the \$50

by the new firm, the proof of the claim against it, and the receipt of the dividends from its estate after notice of the dissolution and of the new firm having assumed and agreed to pay the liabilities of the old firm, as well as the other circumstances mentioned to establish his defence; at the trial the plaintiffs met this defence by saying that, if they had ever seen the notice of dissolution, it had escaped their recollection when the acts upon which the appellant relied were done; that they proved their claim against the insolvent estate under the belief that they were proving it against the estate of the old firm; and that until shortly before the trial they believed that the appellant was still a member of the partnership at the time when the assignment was made.

The trial Judge gave credit to the testimony of the plaintiffs, saying that he believed them to be honest men, and held that no novation had taken place, gave the plaintiffs, on their undertaking to repay them to the assignee, leave to amend by striking out the credit of the two dividends they had received, and gave judgment for the plaintiffs for \$572.44 and interest from the teste of the writ with costs.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 17th and 18th February, 1909.

H. D. Gamble, K.C., and *F. Erichsen Brown*, for the defendant Norris, the appellant. The evidence shews that the plaintiffs had notice of the change of firm and of the assignment; *R. J. Cluff*, one of the plaintiffs, was an inspector of the estate; it was his duty as inspector to know all about this, and when it is a man's duty to know a thing, he must be assumed to know it: *Scarf v. Jardine* (1882), 7 App. Cas. 345, 362. The plaintiffs had notice and received dividends, and must be taken to have elected to rely on the new firm. *Henderson v. Killey* (1889), 17 A.R. 456, is distinguishable; in that case the original debtor remained liable. Some of the remarks in that case make in favour of our contention. The plaintiffs, knowing of the change, accepted the payments, after proving on the estate, and the new firm acknowledged themselves debtors. These facts are sufficient to establish

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a novation. As to reversing the finding of the trial Judge, see *Jones v. Hough* (1879), 5 Ex. D. 115, 122, *per* Bramwell, L.J.; *Phoenix Insurance Co. v. McGhee* (1890), 18 S.C.R. 61, 73; *Dempster v. Lewis* (1903), 33 S.C.R. 292.

G. M. Clark, for the plaintiffs. The findings of the trial Judge should not be interfered with. It is a question of fact, and the Judge has expressly accredited the plaintiffs. There is nothing in the evidence to warrant a finding that the plaintiffs intended to release the appellant, who is the only one good for the debt. I refer to *Ray v. Isbister* (1894), 24 O.R. 497; *Bresse v. Griffith* (1894), *ib.* 492; *Birkett v. McGuire* (1882), 7 A.R. 53. *Brown*, in reply.

October 14. The judgment of the Court was delivered by MEREDITH, C.J. (after setting out the facts as above):—In order to entitle the appellant to succeed, it was incumbent on him to establish that a novation had taken place in respect of the indebtedness of the old firm.

The effect of the decisions as to what is necessary to this mode of discharging a retiring partner from existing liabilities is to be found in sec. 17(3) of the English Partnership Act, 1890, the provisions of which are as follows: "17(3). A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."

There was in this case no such express agreement, and the question is whether such an agreement is to be inferred as a fact from the acts and conduct of the parties which I have mentioned, and which are relied on by the appellant as entitling him to have that inference drawn.

Apart from authority, I should have thought that, assuming knowledge on the part of the respondents of the dissolution and of the agreement between the new firm and the retiring partner, the respondents proving their claim as a claim against the new firm and receiving dividends from the assignee of its estate, with that knowledge, warranted such an agreement being inferred.

In *Harris v. Farwell* (1851), 15 Beav. 31, it appears, however, to have been decided that acts such as these were not enough to constitute an agreement to discharge a deceased partner; and in *Scarfe v. Jardine*, afterwards referred to, some of the Lords seem to have been of opinion that such acts would not discharge a retired partner.

However that may be, it is clear, I think, that such an agreement ought not to be inferred if the respondents proved their claim forgetting that the dissolution had taken place and under the belief that they were proving it against the old firm, and if the respondent R. J. Cluff acted as an inspector and the respondents received the dividends which were paid to them under the like belief—and that the learned trial Judge has found.

I doubt whether, in view of the admissions made by the respondent W. J. Cluff upon his examination for discovery, and particularly his answers to questions 53, 54, 55, and 104, I would have reached the same conclusion. I have not, however, had the opportunity of seeing him in the witness box or hearing his testimony given, and the learned Judge, who had that opportunity, believed him to be an honest man and gave credit to his testimony and that of R. J. Cluff, and, if he was not wrong in doing so, his judgment is right and ought not to be reversed. I cannot say that he was wrong, and his judgment must therefore be affirmed.

Cases such as *Scarfe v. Jardine*, 7 App. Cas. 345, were relied on by counsel for the appellant, but these cases have no application, a different principle and a different question being involved in them.

In *Scarfe v. Jardine* a firm of two partners was dissolved; one retired, and the other carried on the business with a new partner, under the same style. The plaintiff, who had had dealings with the firm before dissolution, after the dissolution sold to the firm the goods to recover the price of which the action was brought, not knowing of the dissolution. He afterwards received notice of it, and, after receiving it, he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate, and it was held that the liability of the retired partner was a liability by estoppel only, and not jointly with the members of the new firm; that the plaintiff might at his option have sued the retired partner or the members of the new firm, but could not

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sue all three together; that, having elected to sue the new firm, he could not afterwards sue the retired partner. Lord Selborne points out, at pp. 350-1, the distinction between such a case and a case where, as in this, the question is one of novation, and that distinction is this: Where the liability of the retired partner is one resting not on estoppel only, but the firm of which he was a member is the actual debtor, it is necessary to make out a case of novation in order to discharge the retired partner, but where the liability of the retired partner is a liability by estoppel only, the case is one of election, and the creditor after notice of the dissolution is bound to elect whether he will look to the person who is liable to him by estoppel only, or to the new firm which actually incurred the liability. Lord Watson, also, at p. 363, points out very clearly the distinction between such a case as *Scarfe v. Jardine* and such a case as this. He states in substance that where the person sought to be made liable was actually a partner when the debt was contracted, he cannot escape from his liability unless he proves such facts as raise the inference that the creditor has agreed to discharge his claim against him and to accept the new firm as his debtors, and remains liable unless there has been payment or novation of the debt, but that, where the person sought to be made liable has ceased to be a partner when the debt is contracted, and the creditor has notice of this, the creditor has "the right to select his debtor, to hold either the old or the new firm responsible to him for the fulfilment of the contract," and must elect which of them he will look to, and no question of novation arises.

Being of opinion that, upon the facts as found by the learned trial Judge, a case of novation was not made out by the appellant, and being also of opinion that the findings of fact ought not to be disturbed, it follows that the judgment should, in my opinion, be affirmed and the appeal dismissed with costs.

[DIVISIONAL COURT.]

DREWRY V. PERCIVAL.

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Oct. 18.

Contract—Promise to Pay Money—Consideration—Forbearance to Sue—Belief in Cause of Action—Guaranty.

The plaintiff and G. had each lent money to the defendant's brother to assist him in carrying on business as a hotel-keeper; the hotel was burned; G., meeting the defendant, said something to him about the insurance, and the defendant said it did not matter about the insurance, as far as the plaintiff and G. were concerned—"I am going to pay you people"—or words to the same effect. G. informed the plaintiff of this undertaking, and some months later the plaintiff wrote to the defendant asking if he (plaintiff) might draw on defendant for the amount of his account. The defendant wrote in answer: "I told G. I would see you would not be losers for cash advanced; I did not promise to pay the amount, but in time see you were paid." More than a year afterwards the defendant asked the plaintiff to wait till the insurance was adjusted. The plaintiff at the trial swore that he waited because the defendant asked him to. The money was advanced in 1901, the hotel was burned in 1902, and it was not until June, 1907, that the defendant finally refused to pay anything:—

Held, that, as the plaintiff believed he had a good cause of action, and delayed taking proceedings upon the promise that the defendant would pay the amount he had agreed to pay if the plaintiff would wait, there was a good consideration, and the plaintiff was entitled to recover from the defendant the amount advanced to the defendant's brother.

Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449, followed.

Judgment of District Court of Rainy River affirmed.

AN appeal by the defendant George Percival from the judgment of the District Court of Rainy River in favour of the plaintiff.

The reasons for judgment given by CHAPPLE, District Court Judge, on the 3rd July, 1908, stating the facts, are as follow:—

This action is brought by the plaintiff to recover from the defendants the sum of \$1,188.03, being the balance of money advanced by the plaintiff to the defendant Harry C. Percival and interest thereon, for which money so advanced to him the defendant Harry C. Percival made his promissory note, payable to the plaintiff, as set out in the statement of claim. The defendant Harry C. Percival does not dispute his liability to the plaintiff, and, I understand, allowed judgment to go against him by default of appearance.

The plaintiff claims to recover against the defendant George Percival, who is a brother of his co-defendant, on the ground that he promised to pay the said sum so advanced in cash to the said Harry C. Percival.

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It appears that the money so advanced by the plaintiff was for the purpose of assisting Harry C. Percival to carry on the business of a hotel-keeper in what was known as "The Hilliard House," in the town of Rat Portage (now Kenora), and which hotel was destroyed by fire on the morning of the 27th January, 1902.

George A. Graham, who had advanced to Harry C. Percival an equal amount of money at the same time as the plaintiff, happened to be in Toronto, staying at the same hotel as George Percival, at the time of the fire; and on the same day as the fire occurred or the following day, during a conversation they had concerning the financial position of Harry C. Percival and the amount of insurance he had on the property destroyed, the defendant George Percival said to Graham: "It doesn't matter about the insurance so far as you and Drewry are concerned; I am going to pay you people." Within a few days afterwards Graham told the plaintiff what George Percival had so stated to him. Shortly after the conversation with Graham, George Percival telegraphed to Harry C. Percival to "assign all insurance to Drewry and Graham," which he accordingly did, and then followed considerable correspondence between the plaintiff and George Percival concerning the insurance, which the insurance companies had declined to pay, and negotiations for a settlement were carried on for a considerable length of time, and ultimately resulted in only a small portion of the amount of insurance being paid.

In a letter dated the 10th April, 1902, the plaintiff wrote to George Percival as follows: ". . . Will you, therefore, kindly advise me if I may draw on you for the amount of my account?" (meaning the money advanced by him to Harry C. Percival.) And in reply thereto George Percival wrote in his letter dated the 15th April, 1902: "I am in receipt of yours of the 10th instant, and in reply think you are labouring under the impression I promised to pay George Graham and your claim against Harry; that is not so; I told Graham I would see you would not be losers for *cash advanced*. I did not promise to pay the amount, but in time see you were paid." George Percival also on the 27th February, 1902, told George A. Toole, who is the plaintiff's accountant, that he would see that the plaintiff was paid the account (meaning the money advanced to Harry C. Percival aforesaid),

and he subsequently promised the plaintiff that he would pay the same.

The plaintiff contends that the letter of the 15th April, written and signed by the defendant George Percival, is a sufficient note or memorandum of his promise to satisfy the Statute of Frauds, and that George Percival is liable to pay to him the amount claimed by him in this action.

There is no question as to the promise made by the defendant George Percival to Graham, as it is not denied in the evidence before me, and, although his counsel contended that his letter of the 15th April must contain the same express terms as his verbal promise in order to satisfy the Statute of Frauds, I cannot agree with him. There is no doubt that, while the promise made by George Percival to Toole and to the plaintiff may be evidence of some confirmation of his promise to Graham, still they do not make the defendant George Percival liable to the plaintiff, as the requirements of the Statute of Frauds have not been complied with. But the statute does not require the agreement itself to be in writing, but only some note or memorandum thereof; and it was held in *Thomson v. Eede* (1895), 22 A.R. 105, that, "as a written memorandum of an oral guaranty is required only for the purpose of evidence, a letter or other writing subsequently given by the guarantor sufficiently shewing the terms of his undertaking will suffice."

In *Bailey v. Sweeting* (1861), 30 L.J.C.P. 150, it was held that a letter repudiating the contract was a sufficient note or memorandum to satisfy the statute; and the decision in *Wilkinson v. Evans* (1866), 35 L.J.C.P. 224, was to the same effect.

George Graham says that the defendant said, "I am going to pay you people;" George Percival in his letter says, "I told Graham I would see you would not be losers for cash advanced"—surely meaning the same thing, that he would pay them or see that they were paid. The letter is unintelligible unless thus construed, and the evidence supports that contention. The claim of the plaintiff is all for cash advanced and interest thereon, and, while no definite time is mentioned for the payment, surely the plaintiff has waited a reasonable time, and I so find.

The defendant further contends that there is no consideration to support the promise.

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By sec. 8 of ch. 146 of R.S.O. 1897 it is not necessary that the consideration should appear in writing; nor need the consideration pass directly from the party giving to the party receiving it. It is enough if a benefit arises to the party for whom the guaranty is given. An agreement by a creditor to extend the time for the payment of a debt and to forbear to sue thereon or otherwise seek to collect the debt is a sufficient consideration for a guaranty of payment by a third person; and numerous authorities clearly shew that the giving of time to the debtor or forbearance to sue may be construed from the acts of the parties. In the leading case of *Wynne v. Hughes* (1873), 21 W.R. 628, there was no agreement to forbear suing, but the plaintiff did actually forbear. In *Davies v. Funston* (1880), 45 U.C.R. 369, the defendant, after a note payable to the plaintiff had become due, and while it remained unpaid, indorsed upon it the following words, "I guarantee the payment of the within note to Messrs. T. D. & Co. on demand." The evidence shewed that the consideration for this guaranty was the giving of time to one Chamberlain, for whose debt to the plaintiff the note was given as collateral security. Although no time of forbearance to press was mentioned, the plaintiff did in fact forbear to press Chamberlain for eight months after the guaranty was given.

So in this action I find upon the evidence that George Percival fully understood that he was making himself responsible for the debt owing by his brother Harry. At his request the insurance policies were assigned to the plaintiff and Graham, and time was given for the payment of the debt. There was a forbearance to press for payment by the plaintiff during the time negotiations were going on with the insurance companies and for a long time afterwards.

The letter of the plaintiff dated the 3rd April to George Percival clearly shews his (the plaintiff's) understanding of George Percival's promise to Graham, as he says, in referring to a proposed settlement with the insurance companies—"And since it is understood that you are to see George Graham and myself paid," etc.—which statement George Percival does not deny in his reply of the 7th April. The plaintiff also in his letter of the 21st April asks for payment in the following words: "In conclusion I may say that the entire amount due Mr. Graham and myself is for cash ad-

vanced, and if it is not convenient to you to send a cheque at present, a note would be acceptable and enable us to get use of the money. Trusting you will give this your attention before sailing." Percival replies to this on the 3rd May, from on board the "Oceanic," asking the plaintiff to await his (Percival's) return, but in no way disputing his liability. And the plaintiff did not again ask for payment from George Percival until the 23rd January, 1907, when he encloses a statement shewing the balance of the amount owing to him for the cash advanced to Harry C. Percival, after giving credit for the amount received from the insurance companies.

I therefore find that there was good consideration for the promise made by George Percival, viz., extension of time for payment to Harry C. Percival and forbearance to sue as sworn to by the plaintiff. I find that the defendant George Percival is liable to the plaintiff upon his promise to pay him for cash advanced to his co-defendant Harry C. Percival, as claimed in the statement of claim, with the exception of the note for \$150 bearing date the 8th February, 1902, which was given for money advanced to Harry C. Percival subsequent to the promise made by George Percival, and therefore not included in that promise; and, as the plaintiff has credited the money received from the insurance companies on the cash advanced, George Percival is entitled to have the same deducted from the amount for which he became liable.

I give judgment for the plaintiff as against the defendant George Percival for \$1,039.60 with costs.

The defendant George Percival's appeal from this judgment was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., ANGLIN and RIDDELL, JJ., on the 2nd November, 1908, and on the 4th November, 1908, the Court directed further evidence to be taken, as mentioned in the judgment of RIDDELL, J., *infra*, and, this having been done, the appeal was reargued before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ., on the 6th October, 1909.

W. N. Ferguson, K.C., for the defendant George Percival. The appellant cannot be held liable on such a promise, even if he made it. There was no consideration for the promise. There

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were no notes due at the time of the making of the promise, though there were some outstanding. The plaintiff had advanced all the money at the time, or if he did advance any money on the faith of it, the promise was not made to him: *Eastwood v. Kenyon* (1840), 11 A. & E. 438, 446; 1 Sm. L.C., 11th ed., p. 301. As regards Graham, the promise may be enforceable, provided the words are sufficient promise of guaranty or indemnity: *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885; *Mountstephen v. Lakeman* (1871), L.R. 7 Q.B. 196, 202; *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17. A guaranty must be made to the creditor and accepted by him: *Mozley v. Tinkler* (1835), 1 C.M. & R. 692; *McIver v. Richardson* (1813), 1 M. & S. 577. The cases on the subject of consideration are summed up in DeColyar on Guarantees, 3rd ed., p. 23 *et seq.* The defendant George Percival never made any promise to the plaintiff, but to Graham only, and there was no consideration, as the advances had been made already. There was no sufficient memorandum to satisfy the Statute of Frauds: 1 Sm. L.C., 11th ed., p. 310.

G. R. Geary, K.C., for the plaintiff. The delay granted was sufficient consideration for the promise of George Percival. There was sufficient agency. A representation made to one of a class is sufficient when the men are in a common interest: *Langridge v. Levy* (1837), 2 M. & W. 519; *Swift v. Winterbotham* (1873), L.R. 8 Q.B. 244; *Moritz v. Canada Wood Specialty Co.* (1908), 17 O.L.R. 53; *Van Wart v. Carpenter* (1861), 21 U.C.R. 320; *Harrison v. Cooper* (1908), 11 O.W.R. 817; *Garrett v. Handley* (1825), 4 B. & C. 664; *Walton v. Dodson* (1827), 3 C. & P. 162; *Bateman v. Phillips* (1812), 15 East 272.

Ferguson, in reply.

October 18. The judgment of the Court was delivered by RIDDELL, J.:—The defendant H. C. Percival in 1901, being desirous of buying or leasing the Hilliard House in Kenora, borrowed certain money from the plaintiff, and gave notes for the amount. H. C. Percival went in as lessee, and there continued till the 27th January, 1902, when the hotel was burned.

The defendant George Percival, as the plaintiff swears, “assured me in as many different ways as I presume his command of the English language would allow him to do, that my account should

be paid, that he would see it paid, that he would undertake to do it." After the fire the defendant George Percival was seen by Graham at the Queen's Hotel, Toronto. (Graham had lent H. C. Percival money at about the same time as the plaintiff). It is said that at that interview the defendant George Percival made a promise to Graham that he (George Percival) would pay the plaintiff and Graham.

At the trial the District Court Judge stopped certain cross-examination, and upon an appeal to a Divisional Court (differently constituted) we thought that a continuation of the cross-examination should be allowed before an examiner; this was done, and we have now had the case reargued.

It does not appear that Graham had any authority from the plaintiff to negotiate for him; but it seems clear that the defendant George Percival, at the interview referred to, told Graham of the fire; Graham said something about the insurance, and George Percival said: "It doesn't matter about the insurance so far as you and Drewry are concerned. I am going to pay you people"—or words to the same effect. This Graham took as a message to both of those interested, the plaintiff and himself, as indeed was most natural, and as was, no doubt, intended by George Percival. The plaintiff and Graham were, in the matter of the insurance, acting together, the insurance being the security they were to receive: Graham did look after the insurance for both parties; he had informed the plaintiff that he would do so, and this was acceptable to the plaintiff. Graham, within the next ten days, informed the plaintiff of the undertaking of George Percival to pay the two creditors. Immediately after the fire, George Percival telegraphed to H. C. Percival to assign the insurance policies to Graham and the plaintiff: and, as some trouble occurred in getting the policies paid, it was arranged that the policies should be assigned to George Percival. On the 10th April, 1902, the plaintiff wrote to George Percival that he and Graham were agreeable to do this, and added: "Will you, therefore, kindly advise me if I may draw on you for the amount of my account?" George Percival answered on the 15th April, saying: "I told Graham I would see you would not be losers for cash advanced; I did not promise to pay the amount, but in time see you were paid." The plaintiff answered on the 21st April saying that all the claim was for money advanced. The reply

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of George Percival was simply to the effect that he was leaving New York—this was on the paper of an ocean steamer and dated the 3rd May. The policies were not assigned to George Percival, but another arrangement was made in December, 1902, not of importance here. In August, however, George Percival was in Kenora, and asked the plaintiff to wait until the insurance was adjusted. "The time that he wants is the adjustment of the insurance, and, if I do not get sufficient out of the insurance, then he will take care of the balance." "I was waiting at Mr. Percival's request, doing nothing because he asked me not to." Waited "because Mr. Percival had asked me to." Long after the adjustment of the insurance, and in January, 1907, and later months, the matter is again taken up, and finally in June, 1907, the defendant George Percival refuses to pay anything.

Much of this evidence does not come within the purview of the order for continuing the cross-examination; but it is brought out by the defendant's counsel, and consequently he cannot complain.

There can be no doubt that the plaintiff believed that he had a good cause of action; and it is equally clear from doubt that he delayed taking proceedings upon the promise that George Percival would pay the amount he had agreed to pay if he (the plaintiff) would wait. I do not, therefore, think it necessary to examine the case as if it depended upon the validity in law of the promise made to Graham, or to go into the somewhat difficult questions of law dealt with by the learned District Court Judge.

Ever since the case of *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449, at least, it has been the law that "if a man *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration:" *per* Cockburn, C.J., at p. 452.

In *Ex p. Banner* (1881), 17 Ch. D. 480, some doubt seems to have been cast upon this principle (see p. 490) by Brett, L.J.; but this doubt is in turn spoken of with disapproval by the Court of Appeal in *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; and there can, I think, be now no doubt that the law is as stated by Cockburn, C.J.

The appeal should be dismissed with costs, including the costs of the former hearing and of the examination of witnesses at that hearing ordered.

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Easement—Conveyance of Lots according to Registered Plan—Park Reserve and Entrance Marked on Plan—Obstruction by Purchaser of Lots—Right of Purchaser of other Lots to Removal—Mistake—Reformation of Deeds—Equitable Title—Registry Laws—Notice—Statute of Limitations—Period Necessary to Bar Right to Easement—Judgment in Former Action—Estoppel.

Upon a registered plan of land in the township of Bertie there were laid down one hundred and sixty-two lots, and there were shewn upon it six blocks, lettered from A to F; between these blocks there was a space marked "No thoroughfare, private entrance for occupants of lots in Crescent Beach tract;" and, except between blocks E and F, there was at the lake shore end of the space a figure marked "Park Private Reserve," and between blocks E and F two figures similarly marked. All of these lots were originally owned by the Crescent Beach Association, and the plaintiff and defendant each bought and had conveyed to them certain lots according to the registered plan, and certain other lots were demised to the defendant by the association for a term of 99 years from the 21st August, 1894. The defendant, by mistake, occupied with her house and grounds part of one of the spaces marked "entrance" on the plan and part of one of the parts marked "Park Private Reserve." The plaintiff, alleging the right of herself and all other the property holders at Crescent Beach to the enjoyment of the private entrance and park reserve, brought this action to restrain the defendant from obstructing and to compel the removal of the house, etc. The defendant pleaded a mistake as to the land conveyed and demised to her and also the Statute of Limitations:—

Held, that the defendant was not, in the present action, to which the association was not a party, entitled to a reformation of the instruments of conveyance from the association to her; and *semble*, that the evidence would not justify a reformation.

Held, also, that if the defendant were in equity the owner of the land which she claimed to have purchased from the association, her equitable right could not prevail against the plaintiff, who claimed under a registered conveyance; there was no evidence that the plaintiff purchased with such notice of the defendant's equitable right as would be required to defeat the plaintiff's registered title; all that was shewn was that the plaintiff had notice that the defendant was in possession and had made valuable improvements on the land, and that was not sufficient.

Held, also, following *Mykel v. Doyle* (1880), 45 U.C.R. 65, that the defendant's possession for ten years was not sufficient to bar the right of the plaintiff to the easements claimed by her.

Held, also, that the plaintiff was entitled to the easements or rights claimed; that was the effect of the plan and the conveyances of lots to her.

Semble, also, that the defendant was precluded by the judgment in a former action from setting up in this action the same defences in regard to the easements claimed by the plaintiff as had been set up in regard to the lots in question in the former action.

Judgment of M^ULOCK, C.J.Ex.D., reversed.

THIS was an appeal by the plaintiff from the judgment of M^ULOCK, C.J.Ex.D., pronounced at the trial of the action before him, sitting without a jury, at Welland, on the 24th November, 1908, by which he directed that the action should be dismissed with costs.

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The plaintiff claimed to be the owner of lots 111 to 121, both inclusive, in block D according to the registered plan of lots numbers 3 and 4 in the 1st concession on Lake Erie in the township of Bertie, in the county of Welland, made by George Ross, provincial land surveyor.

All of these lots were originally owned by the Crescent Beach Association, and lots 111, 112, 113, and 114 were conveyed by the association to Mary C. Selleck by deed dated the 26th October, 1899, and registered on the 29th November following, and were conveyed by her and her husband to the plaintiff by deed dated the 12th September, 1902, and registered on the 16th day of the same month; lots 115 to 121 both inclusive were conveyed by the association to the plaintiff by deed dated the 1st November, 1906, and registered on the 6th day of the same month.

The defendant had a paper title to lots 122 to 129, both inclusive, in block E according to the same registered plan. All these lots were also originally owned by the association; lots 126 and 127 were conveyed by the association to Peter P. Miller by deed dated the 20th and registered on the 23rd July, 1903, and by Miller to the defendant by deed dated the 19th and registered on the 26th November, 1906; lots 128 and 129 were demised by the association to the defendant for a term of 99 years from the 21st August, 1894, by indenture of lease dated that day and registered on the 18th December following, the rent for the term being stated therein to be \$600 payable in cash, the receipt for which was acknowledged; and lots 128 and 129, together with lots 122, 123, 124, and 125, were conveyed by the association to the defendant by deed dated the 12th and registered on the 27th March, 1908.

Upon the registered plan there were laid down one hundred and sixty-two lots, and there were shewn upon it six blocks, lettered A, B, C, D, E, and F; between these blocks there was a space marked: "No thoroughfare. Private entrance for exclusive use of occupants of lots in Crescent Beach tract;" and, except between blocks E and F, there was at the lake shore end of the space a pear-shaped figure marked "Park Private Reserve." Between blocks E and F there were two figures in the space, marked respectively "Park Private Reserve" and "Private Reserve Park."

The defendant's buildings and grounds and roads, as originally erected and laid out, encroached upon lots 114 to 121, both inclusive,

or some of them, and the plaintiff brought an action in the High Court against the defendant, in which she (the plaintiff) claimed a declaration that she was the owner of these lots, and that the defendant was not entitled to any rights over or upon or to the possession of any part of them, and damages and an injunction.

By her statement of defence in that action the defendant set up that in the month of August, 1894, she entered into an agreement with the association for the purchase of that part of lots 114, 115, 116, and 117 in block D (called parcel A), of which she was in possession, and other land, for \$600, which she paid; that she made the purchase for the purpose of erecting on this land a summer residence, and entered into possession of it in August, 1894, and had ever since continued in possession; that she erected a residence and made lasting improvements, of the value of \$3,000, on parcel A, under the belief that the land was her own, and she claimed the benefit of R.S.O. 1897, ch. 119; that when the plaintiff purchased lots 115 to 121 she was "fully aware" that the defendant had her residence on parcel A, and of the circumstances mentioned in her statement of defence, referred to, and "had full notice and knowledge" of the defendant's "right, title, and claim to and possession of" parcel A; and she also claimed title to parcel A by length of possession, and alleged that she made no claim to any of the lands claimed by the plaintiff except parcel A.

That action was compromised; by the terms of the compromise the plaintiff was to pay to the defendant \$300 on the 1st September, 1908, the plaintiff was to be declared to be the owner of lots 115 to 121, both inclusive, the buildings and structures placed there by the defendant were to be her property, and they and all flowers, shrubs, "and all belongings" were to be removed by the defendant not later than the 1st September, 1908; the defendant was to have possession meanwhile of parcel A, and provision was made as to a water-pipe; and it was provided that judgment should be entered in accordance with these terms, including judgment for the plaintiff for possession according to the terms of the compromise, without costs.

The defendant's buildings, grounds, and roads at this time were partly on the space between blocks D and E, already referred to, and partly on that part of it marked "Park Private Reserve."

The defendant, shortly after the compromise was effected,

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removed her buildings and other property from the plaintiff's lots and ceased to occupy any of them; the house was removed to the space between blocks D and E, and it and her grounds and roads were at the time of this action partly on this space and partly on the part of it marked "Park Private Reserve," and partly on the land to which the defendant had a paper title.

The plaintiff's action was brought on behalf of herself and "all other the property holders at Crescent Beach, in the township of Bertie, in the county of Welland," and an injunction was sought to restrain the defendant from obstructing or interfering with in any way or preventing or hindering the plaintiff and all others the property owners at said Crescent Beach in the free and uninterrupted use and enjoyment of said park private reserve and said private entrance to lots for the exclusive use of occupants of lots in Crescent Beach tract, by the placing or erecting a dwelling or building or structure thereon or otherwise howsoever, and to compel the defendant "to remove said dwelling, building, or structure, and plants, shrubs, and other things, off the said park private reserve and private entrance to lots for exclusive use of occupants of lots in Crescent Beach tract now thereupon placed there by the defendant or at her instance."

By her statement of defence the defendant claimed title to the land of which she was in possession, by length of possession, and in the alternative claimed the benefit of the statute as to improvements made under mistake of title.

The defendant by her pleading also alleged that in August, 1894, she purchased from the association a part of its property, which in her pleading is called "the mound," and is described by metes and bounds in paragraph 2 of her statement of defence, and which included that part of the land over which the appellant claimed the rights in respect of which her action was brought; that she (the defendant) paid her purchase money and at once entered into possession of what she had purchased; that by mistake a lease and not a conveyance in fee simple was made to her by the association; and that, also by mistake, what she purchased was described as lots 128 and 129, and that this erroneous description was by mistake followed in the conveyance to her from the association of the 12th March, 1908; and she alleged that the appellant purchased lots 115 to 121, both inclusive, from the association

knowing that the defendant was entitled to the mound, and that she had made lasting improvements on it, and that she was and had been for many years in possession of it, claiming title to it.

At the trial the defendant adduced evidence in support of the various grounds of defence set up by her, and satisfied the learned Chief Justice that she had purchased the mound and been put in possession of it by the association, and that the mistakes which she alleged were made were proved; and he also found that her defence based upon the Statute of Limitations was made out; and dismissed the action with costs.

The appeal was heard by a Divisional Court composed of MERE-DITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 15th and 16th February, 1909.

E. D. Armour, K.C., and *G. H. Pettit*, for the plaintiff. The result of the decisions is that conveyance according to a plan makes the plan a part of the deed: *Carey v. City of Toronto* (1885), 11 A.R. 416. The main grounds of appeal are that the trial Judge erred in holding that the Statute of Limitations applied, and that under the settlement of the first action the defendant practically acknowledged the plaintiff's right to the street—the effect was to convey the plaintiff's land to her with the right of way. I refer to *Iredale v. Loudon* (1908), 40 S.C.R. 313; *In re Nisbet and Potts' Contract*, [1906] 1 Ch. 386; *Winfield v. Fowlie* (1887), 14 O.R. 102; *Hill v. Broadbent* (1898), 25 A.R. 159, 166. The decision of the trial Judge on the question of possession is opposed to *City of Toronto v. Ward* (1909), 18 O.L.R. 214. Cessation of enjoyment does not extinguish an easement: *Gale on Easements*, 8th ed., pp. 520, 526. The Statute of Limitations does not apply to rights of way: *Mykel v. Doyle* (1880), 45 U.C.R. 65. Abandonment is a question of intention on the part of the owner of the dominant tenement; waiver is always a question of fact: *Bell v. Golding* (1896), 23 A.R. 485. Here there could be no intention, as all parties were mistaken as to where the street was; after the mistake was discovered, the first action was brought, which resulted in a settlement. The evidence shews that there never was any waiver by the plaintiff of her rights.

W. M. Douglas, K.C., and *T. D. Cowper*, for the defendant. The plaintiff knew that the defendant occupied the "mound"

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with her house, garden, etc., and bought her lots with the object of harassing the defendant. There was no question of a lease when the defendant bought in 1894 for \$600. It was understood by the defendant to be a purchase from the association, and she did not know she was getting a lease. *Carey v. City of Toronto*, 11 A.R. 476, shews that there is no right in gross to the streets laid out on a plan—it is a question of individual right in each case. The statute had begun to run in favour of the defendant before the plaintiff acquired any rights: see *Darby & Bosanquet on Limitations*, 2nd ed., p. 320; *Stackpoole v. Stackpoole* (1843), 4 Dr. & War. 320. The registration of the plan does not prevent the statute from running. The association could not have a right of way over their own land; what they gave the defendant was only nominally a lease; it was rather a *profit à prendre*: see *McLeod v. Lawson* (1906), 7 O.W.R. 519, judgment of Mabee, J., varied (but not on this point), 8 O.W.R. 213. The reservation of rent is a necessary element in a lease. Here there was no occupancy of the leased premises by the defendant, and it is only in such a case that the principle of *City of Toronto v. Ward*, 18 O.L.R. 214, as to encroachment, applies. See *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894, 911; *Finch v. Gilray* (1889), 16 A.R. 484. The cases relied upon by the plaintiff relate to an easement existing before the squatter entered—as in *In re Nisbet and Potts' Contract*, [1906] 1 Ch. 386—but here the right of the plaintiff did not arise till four years after the defendant entered. The plaintiff's contention as to the settlement was no part of the original case, and only came up incidentally. In any case it does not affect the defendant's main position, which rests on the Statute of Limitations. There was acquiescence by the association in the obstruction of the road by the defendant. The settlement of the first action was for the sake of peace, and the defendant never for a moment supposed it had anything to do with her claim to the mound. The right of way did not pass by the conveyance under the statute; the statute only passes something physically used: *Adams v. Loughman* (1876), 39 U.C.R. 247. The settlement of the first action gives the plaintiff the lands in the pleadings mentioned, but the way was not in question in that action, so *res judicata* does not apply.

Armour, in reply. The passage cited from *Darby & Bosanquet* does not apply to reversionary interests, which are in question here.

The fact that the rent was paid in a lump sum does not make the lease any less a lease. A tenant going into possession by mistake cannot acquire title against his landlord: *Littledale v. Liverpool College*, [1900] 1 Ch. 19. The Court will not presume a wrong. The tenant is in possession, supposing that he is occupying a part of the demised property; he is estopped from claiming it against his landlord under the statute. *McLeod v. Lawson*, 7 O.W.R. 519, does not apply; a *profit à prendre* is quite a different thing. The abstract shews deeds according to the plan since 1887, and the deed expressly gives all rights over all ways, etc. It is a question whether all lanes, etc., shewn on a plan are not public streets. In any case the plaintiff claims through those who had the right to these ways. The plaintiff's case does not turn on the question whether or not a right of way comes within the statute. The case cannot be severed from the settlement of the former action. That action was brought to compel the removal of the defendant's buildings from the plaintiff's lots, and that includes removing them from the street appurtenant to the lots. The declaration of the Court in the former case is equivalent to a conveyance from the defendant, who cannot derogate from her grant. There is no case for reformation of the lease against us—that would be an equity against the association, who are not before the Court.

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October 15. The judgment of the Court was delivered by MEREDITH, C.J. (after setting out the facts as above):—Assuming that the findings of fact of the learned Chief Justice are warranted by the evidence, I am unable to see how, upon the present record and in an action to which the association is not a party, what would be practically a reformation of the instruments of conveyance from the association to the respondent could be adjudged. It is probable, however, I think, that it was not intended that such a judgment should be pronounced, and that what the learned Chief Justice says as to the mistake has relation to the defence based upon the respondent's possession and the Statute of Limitations.

If it were necessary for the decision of the case to determine whether a case for the reformation of the conveyances was made out, I would have great difficulty in coming to the conclusion that the respondent had made out such a case.

It is for me difficult to understand how an intelligent woman,

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which the respondent is, could have been the victim of such a series of mistakes as, according to her testimony, occurred, and much more than the uncorroborated statements of the respondent and her husband would, in my judgment, be requisite to entitle her to have the conveyances reformed so as to carry out what she alleges the transactions between her and the association really were, and to effect what she asserts was the real purpose of them.

Even if, as between her and the association, a case for the reformation of the instruments of conveyance has been made out, and she was in equity the owner of the land which she claims to have purchased from the association, her equitable right cannot prevail against the appellant, who claims under a registered conveyance.

I find no evidence to support a finding that the appellant purchased with such notice of the respondent's equitable right, if any she had, as is required to defeat the appellant's registered title. All that is shewn is that the appellant had notice that the respondent was in possession and had made valuable improvements on the land over which the appellant claims the right she is seeking to enforce in this action, and that is not sufficient to entitle the respondent's equitable interest to prevail against the appellant's registered title: *Grey v. Ball* (1876), 23 Gr. 390; *Roe v. Braden* (1877), 24 Gr. 589; *McVity v. Trenouth* (1905), 9 O.L.R. 105, *per Osler, J.A.*, at p. 110.

If the respondent is to succeed, she must, in my opinion, do so on her defence based on the Statute of Limitations.

That the respondent's possession for ten years is not sufficient to bar the right of the appellant to the easements claimed by the latter, we are bound to hold on the authority of *Mykel v. Doyle*, 45 U.C.R. 65; that decision has been questioned, but has never been overruled, though I am bound to say that if the matter were *res integra* I should be of the same opinion as Armour, J., who delivered a dissenting judgment in that case.

That the effect of the plan and the conveyances to the appellant and to Mrs. Selleck by the association was to confer on them, and on the appellant as to the lots she claims by conveyance from Mrs. Selleck, the easements or rights in respect of the space between blocks D and E and the park in that space, was not disputed by counsel for the respondent, and there is, in my opinion, no doubt

as to the right of the appellant to have both unobstructed and the use of them for the purposes indicated on the plan.

I have not found it necessary to consider whether the terms of the consent judgment in the former action are not such as to exclude the defence based on the Statute of Limitations, which is set up to the present action, if it would have been otherwise available to the respondent; there was much force in the argument of counsel for the appellant that the declaration as to the appellant's ownership of the lots claimed by her, the lots being described in the statement of claim as being according to the registered plan, carried with it a declaration that as such owner she was entitled to the rights over the space and the park reserve which the plan shews were intended to be enjoyed by the occupants of lots in the tract shewn on the plan, and so to exclude the defences which the respondent has set up.

Nor is it necessary to determine whether the effect of the consent judgment founded on the compromise in the former action does not estop the respondent from setting up against the appellant the alleged purchase from the association of the mound, and claiming that her title is to prevail against the appellant's registered title. That question was determined adversely to the respondent, and the appellant's title to parcel A has been established by the consent judgment, and I am inclined to think that, as to the matters of defence pleaded in this action which were pleaded in the former action, the respondent is precluded by the judgment from again litigating them, as well as to the easements claimed by the appellant in respect of her lots as to the lots themselves.

The judgment of the learned Chief Justice should, in my opinion, be reversed, and there should be judgment in the terms of the claim of the appellant, and the respondent should pay the costs of the action and of appeal, but the operation of the injunction should be suspended for a year to enable the respondent to remove the obstructions complained of.

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TRUSTS AND GUARANTEE CO. v. MUNRO.

Company—Winding-up—Payment to Creditor within 30 Days—Preference—Winding-up Act, sec. 99—Restoration of Trust Moneys—Breach of Trust—Commencement of Winding-up.

On the 14th October, 1905, a sum of \$1,340.57 was deposited in a bank to the credit of H., executor, and was on that day withdrawn by him and placed to the credit of a company, of which he was president, in its account with the same bank. This money was held by H. in trust for the children of M., and the placing of the money to the credit of the company was a breach of trust by him. On the 6th December, 1906, the company being then insolvent, H. withdrew from the assets of the company for his *cestuis que trust* a sum of \$1,969.61, the purpose being admittedly to protect the *cestuis que trust* and to give them a preference. This sum was debited to an account in the books of the company, headed "H. in trust for M.," etc., at the credit of which there was a large balance, including the \$1,340.57. A petition for an order for the winding-up of the company was served on the same day on a solicitor who accepted service on behalf of the company, and on the 11th December, 1906, a winding-up order was made:—*Held*, that the money handed over by the trustee to the company was, when the \$1,969.61 was withdrawn, no longer capable of being ear-marked, and it was impossible for the *cestuis que trust* to follow it; the company was simply a debtor to the trust estate for the amount which it had received from the trustee, and the withdrawal of the money was in substance and effect a payment by the company to its creditors of so much of what it owed them; and therefore sec. 99 of the Winding-up Act, R.S.C. 1906, ch. 144, applied, and the liquidator of the company was entitled to recover from the trustee and *cestuis que trust* the amount withdrawn.

By sec. 99 the payment is void when made to a person knowing the inability of the company to meet its engagements, and the view of the debtor in making the payment is not made an element to be inquired into in the application of the section.

In re Stubbins (1881), 17 Ch. D. 58, and *Ex p. Taylor* (1886), 18 Q.B.D. 295, distinguished.

Quære, whether the impeached transaction took place after the commencement of the winding-up.

ACTION by the liquidators of the Wm. Hamilton Manufacturing Co. to recover from the defendants a sum of money paid by the company to the defendant William Hamilton, as trustee for his co-defendants, after notice of motion for a winding-up order had been served, in repayment of money advanced to the company, of which he was managing director, out of trust moneys in his hands belonging to his co-defendants.

The action was tried by BOYD, C., without a jury, at Toronto, on the 15th February, 1909.

J. Bicknell, K.C., for the plaintiffs.

G. H. Watson, K.C., and *D. W. Dumble*, K.C., for the defendants.

February 16. **BOYD, C.**:—"Creditor" in the Winding-up Act includes all persons having any claim against the company, present or future, certain, ascertained, or contingent, for liquidated or unliquidated damages: R.S.C. 1906, ch. 144, sec. 2 (j). By sec. 5 the winding-up shall be deemed to begin at the time of the service of the notice of presentation of the petition for winding-up. By sec. 20, from the time of the making of the order the company shall cease to carry on its business, except for the purpose of winding-up. By sec. 99, every payment made within 30 days next before the commencement of the winding-up by a company unable to meet its engagements in full, to a person knowing such inability, shall be void, and the amount paid may be recovered by the liquidator.

William Hamilton was managing director of the Wm. Hamilton Manufacturing Co., now insolvent, and was also a trustee of moneys belonging to his co-defendants as beneficiaries.

On solicitation of the bank, the said Hamilton deposited trust moneys to the extent of \$1,340 to the credit of the company, in October, 1905, in order to strengthen the financial condition of the company. This money was withdrawn for the purposes of the company, and interest was allowed on the amount deposited by the trustee, up to the date of the payment now impeached.

The company became involved, and on the 6th December, 1906, after notice of the presentation of a petition for winding-up had been served, made the payment impeached, in amount equal to the said \$1,340 and interest, to the said managing director and trustee. The payment was made out of the assets of the company collected in the course of its business.

Granted that trust moneys were brought into the company, and that the company is affected with knowledge that it was a breach of trust, and that, while the moneys remained identifiable, they could be followed and recovered, yet that trust element was dissipated when the moneys were paid out here and there in the prosecution of the company's business, and were no longer capable of being "ear-marked." With the disappearance of the trust element, the company became simply a debtor of the trustee, and he was simply a creditor of the company.

When the payment now impeached was made, the company

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was incapable of doing business, the moneys in its hands or power were moneys of the body of creditors, and for the company to apply part for the payment of a claim of its own manager, growing out of a breach of trust on his part, was unfair to the whole body of creditors, and a payment forbidden by the express terms of the Act. The policy of the Winding-up Act is to secure for all creditors the equal distribution of assets, and in this aspect its scope is much beyond the Statute of Elizabeth—now carried into R.S.O. 1897, ch. 334. Without any express provision, a transaction which involves unfair preference of one creditor is contrary to the spirit and meaning of the insolvency legislation: *Marks v. Feldman* (1870), L.R. 5 Q.B. 275, 279. This is an *â fortiori* case as being a payment by the company to its own manager, and made after proceedings in insolvency had actually begun.

Section 99 of the Winding-up Act appears to exclude questions of intent and to make the fact of payment of the assets of the company to a creditor within the period enough to avoid it. The English cases cited are distinguishable both with regard to the words of the particular statute and in that the person making payment was himself the person guilty of breach of trust and acting with a view to repair it rather than to give a preference to a creditor. The relation in this case between the company and Hamilton was that of debtor and creditor, though the relation, no doubt, between Hamilton and the beneficiaries was that of trustee and *cestuis que trust*, as well as that of debtor and creditor. I think that to give effect to the defence would be to read something into the statute which is not in the section and to minimise its salutary effect in a public point of view. If companies were to be at liberty to borrow trust money and use it as floating capital of the company, and then, when financial troubles thickened, were to be able, under guise of repairing the breach of trust, to restore, out of current funds, principal and interest to the beneficiaries (even though infants) as preferential claimants, it would go to imperil financial credit and frustrate, to my mind, the scheme of the Act.

Holding these views, I give judgment in favour of the plaintiffs, and order that the money received be repaid by the defendants; as to William Hamilton, judgment for the whole; as to

the beneficiaries, for such share as has been received by them, in case it is received from or paid by the trustee. Liquidators' costs to be paid out of the assets, if no costs levied from the trustee.

The defendants appealed from this judgment, and their appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 7th June, 1909.

G. H. Watson, K.C., for the adult defendants. The defendant William Hamilton deposited the moneys in a bank at Peterborough, and subsequently transferred them to the company's credit in the bank, and, when the company was on the eve of insolvency, repaid the money to William Hamilton, who turned it over to his co-defendants. Service of the winding-up proceedings must be taken to have been made on the 8th December, when it came to the knowledge of the company, not on the 6th, when a solicitor accepted service of notice of motion for a winding-up order. The payment was made on the 6th, and so was before the commencement of the winding-up. The relation here is not that of debtor and creditor, but that of trustee and *cestui que trust*, the company being the trustee. I refer to *In re Stubbins* (1881), 17 Ch. D. 58; *Ex p. Taylor* (1886), 18 Q.B.D. 295; *In re Blackpool Motor Car Co.*, [1901] 1 Ch. 77; Lewin on Trusts, 11th ed., p. 1082, and cases there cited.

M. C. Cameron, for the infant defendants.

J. Bicknell, K.C., for the plaintiffs. Sections 98 and 99 of the present Winding-up Act apply. Section 98 must be read with sec. 2. There was no misapplication or breach of trust on the part of the company: Masten's Company Law, pp. 662-666. It was simply a case of a fraudulent preference of a creditor. For a definition of a fraudulent preference, see *Davidson v. Ross* (1876), 24 Gr. 22. *Molsons Bank v. Halter* (1890), 18 S.C.R. 88, was decided under a different section. I rely on *Kirby v. Rathbun Co.* (1900), 32 O.R. 9; *In re Paine, Ex p. Read*, [1897] 1 Q.B. 122; *Sharp v. Jackson*, [1899] A.C. 419, 426. The service on the solicitor was good; the onus is on the defendants to shew that it was unauthorised.

Watson, in reply. The relation is not that of debtor and creditor, nor was the trust a constructive one; it was an express trust, as the evidence shews. Even if the money was paid over

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after the winding-up commenced, it did not affect the right of the defendants to hold the money.

October 14. The judgment of the Court was delivered by MEREDITH, C.J.:—The respondent company is the liquidator of the William Hamilton Manufacturing Co. Limited, which by an order dated the 11th day of December, 1906, was directed to be wound up under the Winding-up Act.

The petition for the winding-up order was served on the 6th December, 1906, on a solicitor who accepted service on behalf of the company and undertook to appear “according to the exigencies” of the petition.

There is no reference in the winding-up order to the mode in which service of the petition was proved or indeed any reference to the service of it, although it was apparently made in the absence of the company. It must, therefore, be assumed, I think, that the admission of service of the solicitor was acted on by the Court.

The action is brought to recover from the appellants \$1,969.61 which William Hamilton, the president of the company, on the 6th December, 1906, withdrew from the assets of the company for the appellants, and for which on that day he gave to the company a receipt in the following words:—

“\$1,969.61.

No. 3897.

“Peterborough, 6 December, 1906.

“Received from the Wm. Hamilton Manufacturing Co. Limited, of Peterborough, the sum of nineteen hundred and sixty-nine 61/100 dollars in full for the following account.

“Wm. Hamilton in trust for children late George Munro.

“Approved

“Wm. Hamilton,

“President.”

This sum was debited to an account in the books of the company, headed “Wm. Hamilton in trust for Hamilton Munro, Effie Munro, Reid Munro, and Allan Munro,” at the credit of which there was then a balance of \$6,067.06, made up of moneys received and interest upon them.

Included in this amount was a sum of \$1,340.57, which on

the 14th October, 1905, was deposited in the bank to the credit of Wm. Hamilton, executor, and was on that day withdrawn by him and placed to the credit of the company in its account with the same bank.

This money was held by William Hamilton, who was also president of the company, in trust for the children of Euphemia Munro, who was the widow of George Munro, the trusts upon which it was held by Hamilton being declared by a deed dated the 28th May, 1902, and the placing of the money to the credit of the company was undoubtedly a breach of trust by him.

When the \$1,969.61 was withdrawn from the company, the company was admittedly insolvent, and the purpose of the withdrawal was admittedly to protect the *cestuis que trust* and to give them a preference.

The learned Chancellor held that sec. 99 of the Winding-up Act applied, and that the respondent company was entitled to recover from the appellants the amount withdrawn, and gave judgment accordingly.

From that judgment the appeal is brought, and is limited to the \$1,340.57 and interest on it, the appellants conceding that the respondents are entitled to retain their judgment for the residue.

The contention of the appellants is that neither they nor Hamilton, as their trustee, were creditors of the company, and that the payment which is impeached was not a payment to a creditor; that the company were trustees of the money for them; and that the handing over by the company of the money to the *cestuis que trust* was not a contravention of the section relied on by the respondents.

I am of opinion that the judgment of the Chancellor is right and should be affirmed.

As the learned Chancellor points out, the money handed over by the trustee to the company was, when the \$1,969.61 was withdrawn, no longer capable of being ear-marked, and it was impossible for the *cestuis que trust* to follow it, and the company was, therefore, simply a debtor to the trust estate for the amount which it had received from the trustee, and the withdrawal of the money on the 6th December, 1906, was in substance and effect a payment by the company to its creditors of so much of what it owed them.

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In re Stubbins, 17 Ch. D. 58, and *Ex p. Taylor*, 18 Q.B.D. 295, relied on by the appellants, have, in my opinion, no application. In the first place, the impeached transaction was in both cases the making good by the defaulting trustee of the breach of trust out of his own assets. In the case at bar the trust money was improperly lent by the trustee to the company, and the relation between him and those he represented and the company was, in my opinion, that of debtor and creditor. The creditor, no doubt, had higher rights than those of an ordinary creditor, for the *cestuis que trust* might have followed the trust money which had been improperly lent, into any assets of the company into which it could be traced, and the right to recover the money lent would not be barred by the lapse of six years, as in the case of an ordinary simple contract debt, and this because the company, having notice of the breach of trust, could not be permitted to separate the loan from the trust and insist that the loan being barred by the statute the trust is barred also: *per* Turner, L.J., in *Ernest v. Croysdill* (1860), 2 DeG. F. & J. 175, at p. 198; but in all other respects the parties stood to each other in the relation of debtor and creditor.

The cases referred to have no application for the further reason that the provisions of the Bankruptcy Act which were relied on are very different from those of the Winding-up Act which the respondents invoke. It is under the former legislation only a payment made in favour of a creditor or a person in trust for a creditor, and made with a view of giving the creditor a preference over the other creditors, that is made void, and it was because the payments in those cases, having been made by a defaulting trustee in order to make good trust money which he had misapplied, could not properly be held to have been made with the view mentioned in the Act, that the attacks upon the transactions failed. The animus of the debtor was, Lopes, L.J., said, in the *Taylor* case, 18 Q.B.D. at p. 302, "an essential element" in considering whether there had been a fraudulent preference; and he added: "The substantial motive of the debtor in making it (*i.e.*, the payment) must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference."

By sec. 99 of the Winding-up Act, on the other hand, the payment is void when made to "a person" knowing the inability of the company to meet its engagements, and the view of the debtor in making the payment is not made an element to be inquired into in the application of the section.

It is probable, I think, that Parliament, in making this departure from the provisions of the English Bankruptcy Acts dealing with preferential payments, did so for the very purpose of avoiding the introduction of such questions as arose under the latter legislation as to the motives of the debtor, and which have also arisen under the Ontario Acts as to fraudulent preferences by insolvent debtors. See *Molsons Bank v. Halter*, 18 S.C.R. 88, the dissenting judgment of Patterson, J.A., in which may be profitably read as bearing upon the proper construction of such a provision as sec. 99.

Whatever may be the rights of the *cestuis que trust* as against the bank—as to which *Foxton v. Manchester and Liverpool District Banking Co.* (1881), 44 L.T.N.S. 406, may be referred to—the payment by Hamilton was, I think, such a payment as sec. 99 declares to be void.

In the view I take, it is unnecessary to decide the other question raised, *viz.*, whether the impeached transaction took place after the commencement of the winding-up, and, if it did, whether, by reason of that, the transaction, though not open to attack under the provisions of sec. 99, ought to be set aside. I may, however, point out that the Canadian Act differs materially from the English Act in its provisions as to transactions entered into after the commencement of the winding-up. By sec. 153 of the latter Act (the Companies Act, 1862) it is provided that "where a company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void." The corresponding section of the Dominion Act is sec. 21, and applies only to transfers of shares, except those made to or with the sanction of the liquidator under the authority of the Court, and to alterations in the status of the members of the company

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after the commencement of the winding-up, and declares that they shall be void, no power, in terms at all events, being given to the Court to otherwise order.

I may also point out that by sec. 20 of the Dominion Act it is only from the time of the making of the winding-up order that the company is to cease to carry on its business, except for the purposes which the section mentions, and that by sec. 31 it is only upon the appointment of the liquidator that the powers of the directors cease.

The appeal should, in my opinion, be dismissed with costs.

[IN CHAMBERS.]

TOWNSEND V. NORTHERN CROWN BANK.

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Oct. 18.

Particulars—Statement of Claim—Postponement till after Discovery—Practice.

Where the defendant is entitled to particulars of an allegation in the statement of claim, but the plaintiff is unable to give the particulars until he has examined the defendant, within whose knowledge the particulars wholly lie, the proper order is that the plaintiff be at liberty to examine the defendant for discovery, and that particulars be delivered within a certain time after discovery has been obtained.

Order of the Master in Chambers varied.

THIS was an appeal by the plaintiff from an order of the Master in Chambers, dated the 29th September, 1909, requiring the plaintiff within one week to deliver to the defendants "full particulars embracing the full description of each of the conveyances, assignments, and transfers referred to in the 5th sub-clause of paragraph 3 of the statement of claim," confining the plaintiff at the trial to the particulars which he should deliver pursuant to the order, and directing that in default of delivery of the particulars the sub-clause should be struck out without further order.

The appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 8th October, 1909.

W. Laidlaw, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendants.

October 18. MEREDITH, C.J.:—The appellant is the assignee for the benefit of creditors of Joseph E. Brethour, and his action is brought to set aside, either as fraudulent against creditors or as fraudulent preferences, certain securities which he alleges were given by his assignor to the respondents.

In sub-clauses 1 to 4, particulars are given of certain of the securities which are impeached, and sub-clause 5 is as follows: "(5) The said Joseph E. Brethour also executed other conveyances, assignments, and transfers to the defendant bank;" and it is as to this part of the statement of claim that the order was made.

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The appeal raises a somewhat important point of practice, namely, whether such an order should be made as was made by the Master, or an order allowing the appellant to have discovery from the respondents' officers before the statement of defence is delivered, and requiring him to deliver particulars after discovery has been obtained.

The practice given effect to by the Master, which, it was said, he stated to be that uniformly adopted by him, appears to me an inconvenient and cumbrous one, as applied to a case in which a plaintiff is unable to give the particulars until he has had an opportunity of examining the defendant, within whose knowledge the particulars wholly lie. Such a practice results necessarily in the pleading being struck out. No doubt, the appellant could amend after statement of defence, and after defence an examination for discovery could be had, but of what use would that be in such a case? Upon the examination for discovery, it would no doubt be objected, if discovery were sought of transactions not attacked in the statement of claim, that the discovery was not as to relevant matters, and the objection would probably be sustained.

On the other hand, to permit the appellant to have discovery now and to require the particulars to be delivered after the discovery is had, does no injustice to the respondents, and avoids the necessity of an amendment of the statement of claim, and does not put the appellant, as he is put by the Master's order, in such a position that he may never be able to get the discovery necessary to enable him properly to frame his pleading.

The practice which I think the more convenient one has the sanction of a Divisional Court in *Gordon v. Phillips* (1886), 11 P.R. 540, and is in accordance with the practice in England: *Millar v. Harper* (1888), 38 Ch.D. 110; *Waynes Merthyr Co. v. D. Radford & Co.*, [1896] 1 Ch. 29. As was said by Chitty, J., in the last of these cases, "There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars, but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances:" p. 35.

I may add that the course I am taking has the approval of such of my brother Judges as I have had the opportunity of consulting.

The order of the Master in Chambers will be varied by directing that the appellant be at liberty to examine for discovery, the examination to take place within ten days, and that the time for delivery of the particulars be one week after discovery has been obtained, and the costs of the appeal will be costs in the cause.

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Bills of Exchange—Drafts on Bank—Death of Payee Before Presentation—Foreign Domicile—Rights of Foreign Administrator—"Holder" of Bills—Contract of Drawer of Bills—Rights of Ontario Administrator—Money in Court—Retention of Part to be Paid out in Ontario—Costs.

Y., domiciled in the State of California, when on a visit to the Province of Ontario bought from the Bank of Montreal there two drafts, for \$1,000 each, upon a New York bank, and when he died in California they were found among his effects, never having been presented for acceptance or payment. The plaintiff was appointed by a California court administrator of Y.'s estate, and presented the drafts for payment to the New York bank, who refused to accept, the Bank of Montreal having stopped payment of them. The plaintiff then claimed the amount of the drafts from the Bank of Montreal, and the defendant, the Ontario administrator of Y., also making a claim and bringing an action against the bank, the bank paid \$2,000 (less costs) into Court, and an issue was directed between the plaintiff and defendant:—

Held, that the Bank of Montreal by becoming the drawers of the bills did not undertake that the New York bank would accept and pay in New York, but did guarantee that if the New York bank did not do so, they themselves would, if duly notified, reimburse the holder; this was a contract with Y., and he might enforce it; it did not die with Y.; and the plaintiff, the duly appointed representative of Y. in California, where the drafts passed into his hands, was the holder in the legal and mercantile sense; and the money paid into Court represented the drafts and was in the same ownership.

As the defendant was the next of kin of Y., and all the money was not required for payment of debts, it was considered not advisable to pay money out of Court to a foreign administrator, who would necessarily repay some of it to the defendant in Ontario; consequently the latter was allowed the option of a reference to determine the amount which should be sent to the plaintiff; and the costs of both parties were ordered to be paid out of the fund, those of the plaintiff in priority.

Judgment of MAGEE, J., reversed.

APPEAL by the plaintiff from the judgment of MAGEE, J., of the 25th May, 1909.

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On the 24th September, 1904, James Young purchased from the branch of the Bank of Montreal at Cornwall two drafts, for \$1,000 each, drawn on the National City Bank, New York, payable to his order. James Young died in Taylorsville, Plumas county, California, on the 8th March, 1905, with these drafts in his possession uncashed; they formed the bulk of his estate. Administration of the estate of James Young was granted to his nephew, Plumas A. Young, the plaintiff, by the Superior Court of the county of Plumas, on the 5th September, 1905; and administration of James Young's estate was granted to Christy Cashion, the deceased's sister, the defendant, by the Surrogate Court of the United Counties of Stormont, Dundas, and Glen-
garry, on the 23rd November, 1905.

On the 21st February, 1906, Christy Cashion, as administratrix of James Young's estate, brought an action against the Bank of Montreal to recover the amount of the two drafts, \$2,000.

Upon the application of the Bank of Montreal, the local Master at Cornwall, in Chambers, on the 1st August, 1906, ordered that the Bank of Montreal pay into Court the \$2,000, less the costs; that, on this being done, the action brought against the Bank of Montreal be stayed; and directed an issue, making Plumas A. Young plaintiff and Christy Cashion defendant, to decide whether the drafts or the money represented thereby were assets of the estate of James Young in California, which Plumas A. Young as the California administrator would be entitled to receive, or whether the same were assets in the Province of Ontario, which Christy Cashion, the Ontario administratrix, should receive.

The issue was tried at the Cornwall Assizes before MAGEE, J., without a jury, and judgment was given declaring that the moneys in Court were the property of the defendant as assets of the estate of James Young in Ontario, and should be paid out to her.

From this judgment the plaintiff appealed, and the appeal was heard on the 4th October, 1909, by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

C. H. Cline, for the plaintiff. Personal property, having no situs of its own, follows the domicile of its owner: *Thomson*

v. *Advocate General* (1845), 12 Cl. & F. 1; *Preston v. Melville* (1841), 8 Cl. & F. 1; *Liverpool Marine Credit Co. v. Hunter* (1868), L.R. 3 Ch. 479; *Smith's Mercantile Law*, 10th ed., p. 251. A legal title duly acquired in any one country is a good title all over the world: *Simpson v. Fogo* (1860), 1 H. & M. 195; *Irwin v. Bank of Montreal* (1876), 38 U.C.R. 375. The validity of the transfer of chattels is governed by the law of the country where the transfer takes place: *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677; *Hard v. Palmer* (1860), 20 U.C.R. 208, (1861), 21 U.C.R. 49; *Dicey on Conflict of Laws*, 2nd ed., pp. 308, 309, 311; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; *Re Central Bank* (1889), 17 O.R. 574, 585. The obligation incurred by accepting a bill of exchange or making a promissory note is measured by the law of the place where it is payable: *Maclaren on Bills, Notes, and Cheques*, 4th ed., p. 389. Presentation of a draft is necessary to collection: *Smith v. Traders Bank of Canada* (1906), 7 O.W.R. 791; *Bank of Ottawa v. Harty* (1906), *ib.* 869. As to the effect of officials of foreign Courts being entitled to recover: *New York Security and Trust Co. v. Keyser*, [1901] 1 Ch. 666; *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15; 2 *Kent's Commentaries*, pp. 429, 430, 431; *Wilkins v. Ellett* (1869), 9 Wallace (U.S.) 740; *Dixon v. Ramsay* (1806), 3 Cranch U.S. 319; *Ennis v. Smith* (1852), 14 How. (U.S.) 400; *Lucas v. Todd* (1865), 28 Cal. 182. As to place of payment, the debtor has to pay the creditor on demand, where there is no place named for payment: *Blackley v. Elite Costume Co.* (1905), 9 O.L.R. 382, at p. 386; *Attorney-General v. Dimond* (1831), 1 Cr. & J. 356; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

G. A. Stiles, for the defendant. These moneys in Court are assets in Ontario: *Dini v. Fauquier* (1904), 8 O.L.R. 712; *Dicey on Conflict of Laws*, 2nd ed., pp. 307, 449. The plaintiff has no status in Court, as he has no authority to receive the assets: *White v. Hunter* (1841), 1 U.C.R. 452; *Weir's Law of Probate*, p. 48; *Re O'Brien* (1882), 3 O.R. 326; *In re Thorpe* (1868), 15 Gr. 76; *Attorney-General v. Bouwens*, 4 M. & W. 171; *Commissioner of Stamps v. Hope*, [1891] A.C. 476; *Shaver v. Gray* (1871), 18 Gr. 419; *Re Ontario Mutual Life Assurance Co. and Fox* (1899), 30 O.R. 666.

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Cline, in reply. The drafts or moneys are assets to which the California administrator is entitled. The plaintiff has a status in this Court. He is not here as a plaintiff in an action, but is made a plaintiff by the Court.

October 16. The judgment of the Court was delivered by RIDDELL, J.:—The late James Young, then domiciled in the State of California, came to Cornwall, Ontario, in the summer of 1904, there sold a farm of his at Cashion's Glen, and, after remaining in Canada some three or four weeks, returned to his home in California.

When in Cornwall he bought two drafts, Nos. 3330 and 3331, for \$1,000 each, upon the National City Bank, New York, from the Bank of Montreal at Cornwall. They are in the following form:—

“Bank of Montreal,
Cornwall, Ont.,
Sept. 24, 1904.

“No. 3330.

“\$1,000.00.

“Pay to the order of James Young one thousand dollars.

“To the National City Bank,
New York.

“C. E. Abbott,
“Manager.
“A. B. Monk,
“Acct.”

These New York drafts are in practice cashed at par at any point in the United States. He took the drafts with him to California, and on the 8th March, 1905, died in California, without having cashed them.

On the 5th September, 1905, the plaintiff in the present proceedings was, by the Superior Court of the county of Plumas, in the State of California, duly appointed administrator of the estate. The drafts came into his possession as such administrator, and he endeavoured to realize thereon. He indorsed them “Plumas A. Young, administrator of the estate of James Young, deceased,” and sent them through a local bank for collection to

the New York bank. That bank refused payment, as the Bank of Montreal had in the previous May stopped payment of them. The drafts were thereupon sent to the Cornwall bank. That bank answered that they required "a presentation of properly authenticated copies of the letters of administration, and the administrator must be identified, not only as being the administrator who took out the letters of administration, but also that the James Young, whose administrator he is, is identical with the payee of the drafts."

These were, of course, the usual and reasonable business requirements of the bank for its own protection. The attorney in California of the plaintiff, while saying that the former requisite could easily be supplied, said that the latter would require the plaintiff "to dig up the remains of the deceased, transport them to Cornwall, and exhibit them to the paying teller of the bank for identification." This wholly absurd interpretation of the bank's requirement needs no comment.

The defendant, residing near Cornwall, next of kin of the deceased, endeavoured to make an arrangement whereby the drafts might be paid; but she was objecting to some of the claims against the estate which the plaintiff was willing to pay. Not coming to terms with the plaintiff, she, on the 23rd November, 1905, took out letters of administration in the Surrogate Court of the United Counties of Stormont, Dundas, and Glengarry to the estate of the deceased. She on the 21st February, 1906, began an action as such administratrix against the Bank of Montreal for \$2,021, being "the amount paid into defendants' agency at Cornwall, Ontario, by James Young, for which he received two drafts for \$1,000 each on New York, on which drafts defendants stopped payment, said Young having died, and the said sum being now in the possession of the defendants;" and interest thereon "from December 1st, 1905, being one week from date on which plaintiff presented letters of administration to defendants of estate of said James Young, and demanded payment of said sum."

The bank filed a statement of defence, setting up the facts of the purchase of the drafts by James Young, the death of Young in California, letters of administration to the present plaintiff, demand by him of payment of the drafts, the willingness of the

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bank to pay the drafts on presentation and to the person properly entitled, and certain negotiations between the bank and the present plaintiff.

Upon the application of the bank, they were allowed to pay into Court the sum of \$2,000 less their costs, "being the amount to represent the two drafts numbered 3330 and 3331 for \$1,000 each issued by the agency of the bank . . . at Cornwall . . . payable to the order of James Young . . .:" upon such payment the action against the bank became stayed. The California administrator and the Ontario administratrix were directed to proceed to the trial of an issue. The issue as settled was between the California administrator as plaintiff and the Ontario administratrix as defendant. "The plaintiff affirms and the defendant denies that the two drafts numbered 3330 and 3331 . . . or the money represented thereby are assets of the estate . . . in the State of California which the plaintiff as administrator . . . is entitled to receive: the defendant affirming and the plaintiff denying that the same are assets of (*sic*) the Province of Ontario of the estate . . . which the . . . administratrix of the estate . . . is entitled to. 2. The plaintiff further affirms and the defendant denies that the sum of \$1,920 paid into Court in satisfaction of said drafts by the Bank of Montreal under an order . . . is the property of the plaintiff as such administrator as against the defendant as such administratrix, and is (*sic*) entitled to an order for the payment to him thereof."

The issue was tried before my brother Magee, and he (on the 25th May, 1909), directed judgment to be entered for the defendant in the issue, the plaintiff to pay the costs subsequent to the delivery of the issue.

The plaintiff now appeals.

It may be well to state clearly the rights of the deceased immediately before his death, and the contracts then subsisting.

There was a contract upon the part of the New York bank to accept and pay all drafts drawn upon it by the Cornwall bank. This contract was between the two banks; and Young, not being privy to it, could not take advantage of it. He could not sue the New York bank before acceptance or for non-acceptance: *Boyd v. Nasmith* (1888), 17 O.R. 40, at p. 45, and cases cited;

Hopkinson v. Forster (1874), L.R. 19 Eq. 74, 76: Falconbridge on Banking, pp. 609, 610; Encyc. of Laws of England, vol. 2, p. 212.

The proposition that A. can sue B. upon a contract made by C. with B. had its quietus many years ago; a discussion of this may be found in *Kendrick v. Barkey* (1907), 9 O.W.R. 356, at pp. 358-360, 362n.

The Bank of Montreal by becoming the drawers of the bills did not undertake that the New York bank would accept and pay in New York, but did guarantee that if this bank did not do so, they themselves would, if duly notified, reimburse the holder: Encyc. of Laws of England, vol. 2, p. 212; Maclaren on Bills, Notes, and Cheques, 4th ed., p. 371 *ad fin.*; R.S.C. 1906, ch. 119, sec. 82.

This was a contract with Young, and he might enforce it. Neither of these contracts died with Young: his duly appointed personal representative had the same right to enforce the latter as Young himself. The drafts passed into the hands of the plaintiff in California; he was the duly appointed representative of Young in California, and, as such, had the same right to act in California in respect of these drafts as Young would have had, had he lived. See *Hyde v. Skinner* (1723), 2 P. Wms. 196; *Williams v. Burrell* (1845), 1 C.B. 402; *Rawlinson v. Stone* (1746), 3 Wils. 1, 2 Stra. 1260; *Watkins v. Maule* (1820), 2 J. & W. 237, 243.

If the value of the two pieces of paper had consisted in the beauty of the engraving, etc., I presume no one would dispute the plaintiff's right to them: and it seems to me equally clear that the plaintiff was the legal holder of the drafts in the legal and mercantile sense.

I do not think it necessary to trace the legal position of the plaintiff throughout the transaction. The New York bank refused to accept, whereupon the liability attached to the Canadian bank to "reimburse the holder." The liability is not to reimburse, pay, the *original* holder of the drafts as such—he may transmit his rights—the liability is to the holder of the drafts. There can be no pretence that the defendant was the holder of these drafts, and consequently I am unable to see how she can

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be considered as having any claim against the Canadian bank; the action is not for money had and received, but upon the drafts by the holder of the same.

The money paid into Court is in so many words said to represent the two drafts: it follows that this money should be in the same ownership as that of the bills.

Were there nothing more in the case than a dispute between two administrators, the order should be that the money should be paid out to the California administrator under Con. Rule 1114.

But it appears that the defendant is the sole next of kin of the deceased, and that it will not require all this money to pay debts, etc.; it would not be advisable to pay money out of Court to a foreign administrator who would necessarily repay some of that amount to a person in Ontario, partly to this action. With a declaration that the money in strictness should be paid to the plaintiff, the defendant should have the option of taking a reference to the Master to determine the amount which should be sent to the plaintiff. The reference will be at her own expense in reality, as the costs of all parties should be paid out of the fund.

As to the costs of this action, I cannot say that the conduct of the plaintiff was so unreasonable that he should not have his costs out of the fund in priority: if sufficient remain after providing for the costs of the plaintiff of action (and reference, if a reference be taken) and this motion, as also the amount which should be sent him as above stated, the costs of the defendant of action and reference may be paid out of such residue.

If the defendant refuses a reference, then the appeal should be allowed generally, and the amount in Court ordered to be paid to the plaintiff, and he will have his costs of action and appeal out of the fund.

In any event costs of the action shall be considered to begin with the application for interpleader order.

It is to be hoped that the parties will be able to arrive at a settlement, and thereby avoid costs and trouble.

[MEREDITH, C.J.C.P.]

RE CONGER.

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Oct. 4.

Will—Construction—Direction to Pay Debts, etc.—Enumeration of Properties—Absence of Specific Disposition—Residuary Gift.

The testator by his will first directed that all his just debts and funeral and testamentary expenses should be paid and satisfied by his executors. Then followed: "I give devise and bequeath all my real and personal estate of which I may die possessed in manner following that is to say;" and immediately thereafter an enumeration of six properties, followed by: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto" his son and daughter, naming them:—

Held, that there was not an intestacy as to the enumerated properties, but that all the property of the testator, real and personal, was included in the residuary gift.

In re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726, distinguished.

MOTION, under Con. Rule 938, by E. M. Conger, the eldest son of Stephen Marshall Conger, deceased, for an order declaring the true construction of the will of the deceased. The facts are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 4th October, 1909.

W. E. Middleton, K.C., for the applicant.

E. C. Cattanaach, for the infants.

E. F. B. Johnston, K.C., and *G. Grant*, for the executors.

MEREDITH C.J. (at the conclusion of the argument):—I do not think anything will be gained by reserving judgment. I have come to a conclusion as to what the result ought to be, and I think I may as well pronounce it.

The question arises upon the will of Stephen Marshall Conger, which was made upon a printed form, and appears, as I understand, in the letters probate as it appeared in the will itself. It commences in the usual way: "This is the last will and testament of me Stephen Marshall Conger of the town of Picton in the county of Prince Edward," etc.; and then comes a clause revoking all former wills and testamentary dispositions. Then follows the direction that "all my just debts funeral and testamentary expenses be paid," as it reads, "and satisfied by my executors herein-after named as soon as conveniently may be after my decease."

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Then follows a paragraph in the following words: "I give devise and bequeath all my real and personal estate of which I may die possessed in manner following that is to say." Then, under six heads, are enumerated various properties, consisting mainly of real estate, but including the half interest of the testator in the Picton "Gazette" printing office and contents, including notes, accounts, etc. Of course, these six enumerated parts of the property are written in. Then follows in print: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto;" then follows a written part: "McDonald Conger my son and my daughter Mabel Lynette Conger, wife of James W. Allison, with the hope that they will pay over such a sum of money to my grandchildren Merle Pauline Conger and Stephen Harold Conger as they may deem best." Then follows the clause appointing them as the executors.

Now, what Mr. Middleton has argued for is, that the manifest intention of the testator was to make a disposition of the six enumerated properties to some one, and that he has omitted to have written into the will the object of that devise; and it is argued that for that reason there is an intestacy as to the enumerated properties; the argument being, that the words dealing with the residue have the effect of excepting from the disposition made by it the six enumerated properties, and therefore it is contended, upon the authority of *In re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, that these enumerated properties, not being included in the residue, did not pass by the will, but were undisposed of.

I am not able to agree with that contention. I do not see why any such mistake as is suggested should be attributed to the testator, and it seems to me no violence is done to the language which he has used in treating the words "all the residue of my estate not hereinbefore disposed of" as another enumeration of the particulars in addition to those which are described in the written part of the will and numbered from 1 to 6.

Even if it were otherwise, and there was no previous disposition contained in the will, I should doubt whether that would not be the proper view to take of the effect of the will, but in this will there is a preceding effectual disposition of part of the testator's estate. I refer to the direction that the debts and funeral and testamentary expenses are to be paid by the executors; and there-

fore to add to the enumeration of the properties a description of the residue, as the residue "of my estate not hereinbefore disposed of," seems to me to be an accurate description and to sweep in all the estate that had not been disposed of by the paragraph of the will to which I have referred.

The effect of *In re Fraser, Lowther v. Fraser*, is, I think, correctly stated in Theobald on Wills, the Canadian edition, at p. 233. It is there said: "If, however, no disposition of the excepted property is attempted by the testator, or a codicil recognises that an attempted disposition has failed and confirms the will, the same reasoning does not apply, and the excepted property is undisposed of;" and for that *In re Fraser* is referred to as authority.

If it were not that the attempted disposition in favour of the brother in *In re Fraser* had failed, the property which was disposed of to the brother would, by force of the provisions of the Wills Act, have fallen into the residue; but the Court treated it as in the same position as if no attempt whatever had been made to dispose of that excepted property, because the testator, by stating that the brother was dead, shewed that he knew that the gift to him could not take effect, and yet made no other disposition of what he had excepted from the residuary gift.

Where a testator says he gives the residue of his estate, with the exception of certain property, the cases establish that, if there is no disposition of the excepted property, it is undisposed of. If there is an attempted disposition which cannot take effect, such cases as *Blight v. Hartnoll* (1883), 23 Ch.D. 218, apply, the principle of which is that the exception from the residue is for the purpose of giving effect to the disposition of the excepted property, and therefore, where that disposition fails, the exception no longer prevails, and the excepted property falls into the residue.

In the case at bar, the testator gives the residue except what he had in the earlier part of the will disposed of, and if, as Mr. Middleton contended, he had made no disposition of the enumerated properties, it follows that nothing was excepted from the residue.

I think that all the property of the testator, real and personal, is included in the residuary gift which this will contains, and there will be a declaration accordingly. Costs out of the estate.

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Oct. 2

BEAL V. MICHIGAN CENTRAL R.R. CO.

Appeal—Reversal of Trial Judge's Finding of Fact—Duty of Appellate Court—Evidence—Cause of Fire—Sparks from Railway Locomotive—Conjecture—Misapprehension of Evidence.

Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of it, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse the findings.

In an action to recover damages for the destruction of property of the plaintiff by fire alleged to have been started by sparks from a locomotive of the defendants, the trial Judge, MACMAHON, J., found in favour of the plaintiffs:—

Held, by a Divisional Court, reversing the finding, which was based upon a misapprehension of the evidence, that the plaintiffs had failed to meet the onus cast upon them by the law and to prove that the fire which caused the damage came from the defendants' engine.

In every case there must be evidence from which it can fairly be inferred, not simply guessed, that the damage was caused by the defendant.

Connacher v. City of Toronto, an unreported decision of the Queen's Bench Division, 4th March, 1893, and *Campbell v. Acton Tanning Co.*, an unreported decision of the Court of Appeal, 29th June, 1900, specially referred to.

ACTION to recover \$800 damages for the destruction of a barn, etc., contiguous to the railway, by fire, started, as the plaintiffs alleged, by sparks from a locomotive of the defendants. The defendants pleaded "not guilty by statute." The action was tried without a jury, and judgment was given for the plaintiffs for \$500 and costs by the trial Judge, MACMAHON, J., on the 10th June, 1909. The defendants appealed from that judgment.

The appeal was heard on the 7th October, 1909, by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

D. W. Saunders, K.C., and *W. B. Kingsmill*, for the defendants. The evidence is insufficient to connect the defendants with the fire. The barn which was burned was 320 feet away from the tracks, and it was a still, calm night. The evidence shewed that the locomotive of the defendants had not been using steam for more than a quarter of a mile west of the plaintiff Beal's property,

and two engines of the Pere Marquette Railway had passed along the same track within half an hour. The plaintiffs' evidence did not exclude other sources from which the fire might have originated, as it should have done where there was no direct evidence of the cause. The Judge misconceived the effect of the evidence as to the point where the engine was shewn to have had steam shut off, and confused the home signal with the distance signal, the latter being over one-quarter of a mile further west. The Judge improperly admitted evidence of other engines throwing sparks on other occasions.

G. G. McPherson, K.C., for the plaintiffs. There was no evidence that Dertinger (the tenant) used matches. The two Pere Marquette trains which passed went by too long before the fire to have been connected in any way with it. One went by 22 minutes before, and the other 17 minutes before. The evidence of two witnesses supported the theory that the fire came from the Michigan Central locomotive. The sparks may have been emitted before the steam was shut off, and been drawn along by the suction of the train. All the findings of the Judge are supported by the evidence.

October 23. RIDDELL, J.:—The plaintiff Paul Beal was the owner of a barn, etc., in the township of Wyndham near the line of the defendants' railway. On the 22nd September, 1908, these were destroyed by fire, and damage to the amount, as found by the learned trial Judge, of \$500 done thereby to the plaintiff. The plaintiff was insured in the Perth Mutual Fire Insurance Company to the amount of \$300: that company paid the amount of \$300 to the plaintiff Beal and took an assignment from him of all his claims against the defendants for damages in respect of the fire. Beal and the Perth Mutual Fire Insurance Company unite in bringing this action, which was tried by Mr. Justice MacMahon without a jury at Stratford, in June, 1909. Judgment was given at the trial for the sum of \$500 and costs.

The defendants now appeal.

Whether the assignment is valid is not of moment in the inquiry as to the liability of the defendants for damages, as both assignor and assignee sue as plaintiffs. The case of *McCormack v. Toronto R.W. Co.* (1907), 13 O.L.R. 656, may be referred to, as well as

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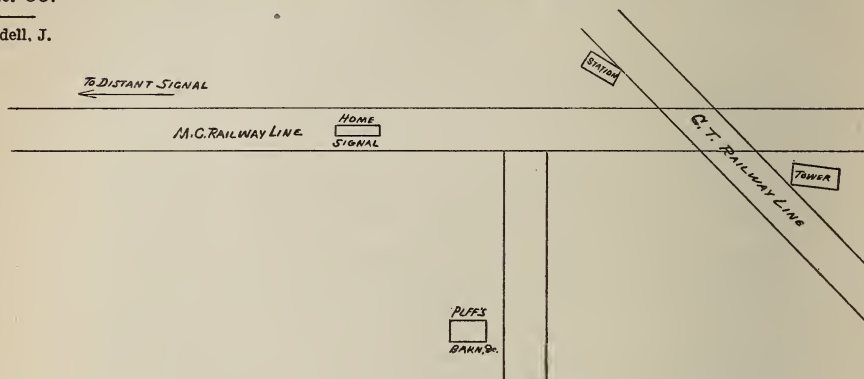
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King v. Victoria Insurance Co., [1896] A.C. 250, therein discussed. Nor in view of the result at which I have arrived, is it of importance to consider the effect of the proviso in 8 & 9 Edw. VII. ch. 32, sec. 9 (D.)

The following sketch will illustrate the *locus in quo*:—



It appeared at the trial that the Wolverine train No. 8 of the defendants passed east about 8 p.m., and that shortly thereafter the place was seen on fire. A witness was called who deposed that she had seen live sparks from the defendants' trains come over near the buildings on previous occasions, and one, a couple of nights before this fire, came down by the pump a little further away from the railway than the barn. This last was from a freight train, and there was then quite a strong wind from the north. As however there was no wind practically, she does not pretend to say that upon the day in question a spark could have come from a train to the barn. The next witness saw the reflection of the fire between two and five minutes after the Wolverine went by: and says that the weather had been extremely dry up to that time. There was little or no wind, and what there was came from the west or north-west, but this was after the fire had been burning 20 or 30 minutes. Others speak of the fire occurring shortly after the Wolverine went by, 2 or 2½ minutes, etc., but all say (who speak of this at all) that it was a very calm night. McDonald noticed that the Wolverine was throwing up sparks that night, but this was about the tower a little east of the depot or station; he cannot be sure of the spot. Shortly after this he saw the fire, but does not pretend to say that these sparks caused this fire.

It is sworn by the employees of the defendants that it is impossible for sparks to be thrown by the engine when steam is cut off; and, even if the steam is on, it is impossible to throw a spark 100 yards away. The nearest point of the property burned from the railway is over 100 yards. The engineer swears that he cut off steam at the distant semaphore half a mile or so west, and "drifted" in without steam until he got over the Grand Trunk Railway diamond by the tower house, putting on steam again about 100 yards east of the crossing. He is corroborated as to the steam being cut off by the towerman, who watched the train, and who says that "she started to use steam after passing the tower," and that he noticed the fire within 3 to 5 minutes thereafter.

The air was still, what little draught there was, was from the south-west, but almost west. The house immediately south of the barn was not burned, and, if there had been any wind from the direction of the track, it would have been impossible to save it. During the hour and three-quarters before the fire there had been two other trains going east on the same line belonging to the Pere Marquette company. It is proved by another that the Wolverine passed the tower at 8.18, a Pere Marquette train at 7.56, and another at 8.01, all being trains going east, the last two freights, the first a special fast train. This witness also is positive that steam was shut off over a quarter of a mile from the tower, as is another telegrapher and towerman.

In reply a witness Donahue is called, who says that he has often seen the engine of the Wolverine throw sparks between his place and La Salute, and says also that he has seen the train throw sparks past the home signal. Upon cross-examination it appears, however, that he calls the distant signal the home signal. This is of importance, as the learned trial Judge in his judgment, speaking of Donahue's evidence, fails to remember that Donahue was not speaking of the signal near the plaintiff's place, but the distant signal many yards away. The learned Judge, coupling the evidence of the engineer that the engine was always the same, with that of Donahue, considers that it has been proved that the engine was in the habit of throwing sparks when approaching and crossing the diamond. Then, saying that it had not been proved that either of the Pere Marquette engines had thrown sparks, he finds that it was a spark from the Wolverine which caused the damage.

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He speaks of the evidence of Mrs. Dertinger that a large spark fell at her feet a night or two before the fire coming from a passing engine; but omits to note that this was during "quite a strong wind from the north," whereas upon the night of the fire there was exceedingly little, if any, wind.

Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence. Of course, "when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons:" *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326, *per* Lord Loreburn, L.C. And "when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses:" *Coghlan v. Cumberland*, [1898] 1 Ch. 704, at p. 705, *per* Lindley, M.R., giving the judgment of the Court of Appeal; *Bishop v. Bishop* (1907), 10 O.W.R. 177.

But where the question is not "What witness is to be believed?" but, "Giving full credit to the witness who is believed, what is the inference?", the rule is not quite the same. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse these findings. Of course the judgment of the trial Judge should be treated with all respect, and if the matter is still in doubt a reversal should not be made.

In the present case the findings are based upon misapprehensions.

There is no more evidence that the Wolverine engine was throwing sparks than that those of the Pere Marquette were doing so, at any point from which the sparks could have got to the plaintiff's property. It must be a mere guess that the defendants' engine sent the spark which caused the fire—if the fire was caused by a spark, and even that is not proved. It would seem to be

not at all unlikely that the tenant, who was seen in a more or less incapable condition by the barn, may have caused the fire himself. But, not to press this point, the selection from amongst the engines is not one, I think, that could be legitimately made. "It is a rule of practical wisdom that a Judge is not allowed to guess:" *per* Kekewich, J., in *In re Howell-Shepherd, Churchill v. St. George's Hospital*, [1894] 3 Ch. 649, at p. 652. This rule applies to cases of all kinds, and not less so to the present than any other. Cases not dissimilar have been decided in our own Courts.

In *Connacher v. City of Toronto* (not reported) the plaintiff complained of the failure of the city to cleanse and disinfect the Brock street sewer and the premises at its outlet; that in the fall of 1891 and the spring of 1892 the water in the bay was low so that the mouth of the sewer was exposed and its contents discharged on land above the water; and a mass of sewage, garbage, and filth was allowed to accumulate about the outlet, whereby the premises surrounding the plaintiff's dwelling became foul and polluted, and by reason thereof the children of the plaintiff were seized with diphtheria, three dying. The action was tried at Toronto winter sittings, 1892-1893, before Mr. Justice Rose and a jury. The evidence proved the vile condition of affairs at the outlet of the sewer, and medical men testified that that condition would favour the development of the disease and the propagation of the germs of diphtheria; that these germs propagate rapidly in filth, especially in dry heat; that the outlet and adjoining lands would certainly be a favourable place for such propagation; that the whole family had been probably exposed to the same cause of infection; and that living in a vitiated atmosphere would tend to deteriorate the health and make one more susceptible to contracting disease; and that it was probable that the germs of diphtheria had been transmitted from the exposed sewage into the air, and thence to the plaintiff's family. The jury found, in answer to questions, that the germs came from the filth, and that the defendants were negligent in not removing this filth. Upon these answers judgment was entered for the plaintiff. An appeal was taken, and on the 4th March, 1893, Armour, C.J., gave the judgment of the Queen's Bench Divisional Court allowing the appeal. He said: "Assuming . . . that the case were put most strongly

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against the defendants, and that they were guilty of a nuisance . . . we are unable to hold that there was any evidence from which the jury might fairly and reasonably infer that the sickness with which the plaintiff's family was affected was caused by such sewage. . . . The theory upon which the plaintiff relied was that there might have been the germs of diphtheria in this sewage; that part of it might have been exposed so as to have been taken up as dust in the air; that in the matter so taken up there might have been some of these germs; and that some of the germs so taken up might have been carried by the air into such proximity to the plaintiff's family as to have been inhaled by them; and that thus the plaintiff's family became infected with the disease. The difficulty in supporting this theory is that there was no evidence that there were any germs of diphtheria in this sewage: that, if there were, any portion of this sewage became sufficiently dry to be taken up into the air; that, if it were, any of such germs were so taken up, and that, if taken up, they were wafted by the air into proximity to the plaintiff's family, and that they were inhaled by them." After pointing out that "it was a mere matter of speculation," and saying, "Whence the germs came which infected the plaintiff's family seems to us to be wholly conjectural, and that they came from this sewage to be entirely guess-work," the Court made an order allowing the appeal and dismissing the action.

A somewhat similar case was tried by my brother Teetzel at Cayuga a few years ago. A township had allowed a pond to remain, become rotten, and infect the air, and it was alleged that typhoid fever had been thereby occasioned to the household of the plaintiff. Germs of typhoid were found in the water of the pond; but my learned brother held that, while the pond might have been the origin of the fever, so to find would be a mere conjecture, and accordingly dismissed the action.

So too in *Campbell v. Acton Tanning Co.* (not reported) the deceased had been stricken with anthrax, which might—and indeed probably did—come from the works of the defendants. Abundant evidence was given that a very great amount of the anthrax germs was in and about the tannery: and the jury at the trial at Guelph found as a fact that the disease did come from germs from the factory, and that the defendants had been negligent. Upon these

findings my Lord, who was the trial Judge, directed judgment to be entered for the plaintiff. Upon appeal, however, the Court of Appeal reversed the judgment and dismissed the action. The judgment was oral and is not reported; I was of counsel for the plaintiff and heard the judgment delivered by Sir George Burton, C.J.O., for the Court, on the 29th June, 1900. It entirely proceeded upon the ground that while the disease might and probably did come from the tannery of the defendants, it was not proved that it did; and that the actual origin of the infection lay in the realm of conjecture. The proceedings in the case are to be found in book 138 of the Judges' Library.

Shields v. City of Toronto, in the Court of Appeal (20th October, 1897), also unreported, is another case to the same effect.

In a case of fire which might have come from a locomotive, but was not proved to have so come, my brother MacMahon non-suited the plaintiff in an action against the Lake Erie and Detroit River Railway Co., tried at Chatham some years ago, and the non-suit was sustained in a Divisional Court. I was of counsel both at the trial and in the Divisional Court.

It is, of course, needless to multiply instances—the law is quite clear that there must be evidence from which it can be fairly inferred, not simply guessed, that the damage was caused by the defendant.

In the present case I think that the plaintiffs have failed to meet the onus cast upon them by the law, and to prove that the fire which caused the damage came from the defendants' engine. It would seem that, had my learned brother not inadvertently failed to notice the correction made in his evidence by the witness Donahue, he would have so found.

The appeal should be allowed with costs and the action dismissed with costs.

Had it been necessary to determine which engine threw the spark causing the fire (assuming that the fire was so caused), I should have thought it much more likely that it was either of the Pere Marquette engines than that of the defendants.

FALCONBRIDGE, C.J., and TEETZEL, J., agreed in the result.

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Oct. 26.

Railway—Carriage of Goods—Destruction—Liability—Contract or Tort—Special Contract between Express Company and Shipper—Construction—Application for Benefit of Railway Company.

The plaintiff delivered to the Dominion Express Company at Toronto goods for transmission to Quebec. The goods were being carried in a car upon the defendants' railway, when a collision took place, and the goods were destroyed; the car was the defendants', but the contents were wholly under the control and in the possession and under the physical oversight of a servant of the railway company:—

Held, that, although there was no privity of contract between the plaintiff and the defendants, the plaintiff had a good cause of action in tort.

Review of the authorities.

The shipping bill contained various provisions limiting the liability of the express company, *inter alia*, also, this provision: "And it is also understood that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom, through this company, the below described property may be intrusted or delivered for transportation:"—

Held, upon a construction of the whole shipping bill (set out below), that the defendants were not a company to whom, through the express company, the property was intrusted or delivered for transportation, and the goods were, therefore, not being carried by them under a special contract with the plaintiff; and they were liable as in tort for the value of the goods.

Lake Erie and Detroit River R. W. Co. v. Sales (1893), 23 S. C.R. 663, distinguished.

Quære, whether, if the defendants had been such a company, they could have taken advantage of a contract made by another company for their benefit, but without their privity.

ACTION to recover the value of goods of the plaintiff destroyed in the course of carriage by the defendants. The facts are stated in the judgment.

The action was tried by RIDDELL, J., without a jury, at Toronto, on the 18th and 19th October, 1909.

G. F. Shepley, K.C., and G. W. Mason, for the plaintiff.

W. Nesbitt, K.C., and A. D. Armour, for the defendants.

October 26. RIDDELL, J.:—The plaintiff, who is a manufacturers' agent in Toronto, delivered, on the 28th February, 1907, to the carter of the Dominion Express Co., a trunk of samples for transmission to Quebec. The express company had supplied the plaintiff with a book of blank forms of shipping bills; the plaintiff filled out one of these bills, and took a receipt, on the delivery of the goods; at the same time, as the goods were to be prepaid, he handed the carter a "paid slip." Not having a blank

"paid slip" of the Dominion Express Co., he gave the carter a form of the Canadian Express Co., filled in thus:—

Canadian Express Company.

Please forward the following packages, charges prepaid, and charge same to us.

BENJAMIN ALLEN.

Toronto, Ont., 28th Feb'y., 1907.

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Article	Weight	Name	Destination	Charges
One Trunk		Victor Mfg. Co.	Quebec	

This slip was returned with the word "Canadian" struck through with a pen and the figures in pencil, under the column "Charges," 4.73. This charge was paid on the 5th March, 1907. The goods were being carried on a car upon the Canadian Pacific Railway, when a collision took place, and the goods were destroyed. The Canadian Pacific Railway Company supplied the car; but the contents were wholly under the control and in the possession and under the physical oversight of a servant of the express company. The express company contended that their liability was at most \$50 under the terms of the shipping bill; the plaintiff sues the railway company for the full value of the goods.

The first objection on the part of the defendants is that there is no privity of contract between them and the plaintiff; and, of course, that is so; and, if this action depended upon a breach by the defendants of some contract with him, the plaintiff must fail. Under the old system of pleading, in which the plaintiff must set out his claim in contract or in tort, there were many instances in which the action failed by reason of the form of pleading. For example, in *Alton v. Midland R.W. Co.* (1865), 19 C.B.N.S. 213, the declaration was in contract. It alleged that B. was a servant of the plaintiffs, that B. was received by the defendants as a passenger to be by them securely and safely carried, whereby it became their duty to securely and safely carry him, yet they did not, to the damage of the plaintiffs. On demurrer, it was held that the action was not maintainable. Erle, C.J., puts the matter in a nutshell, pp. 236, 237: "The demurrer . . . admits that the relation between the defendants and B.

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was created by contract. The plaintiffs, therefore, are seeking to recover consequential damages by reason of the breach of a contract between the defendants and a third person. I take the law to be clear, that, where a servant is injured by matter *ex delicto*, and his master in consequence loses the benefit of his services, the master may have an action against the wrongdoer for that consequential damage. The distinction upon which I rely is, that, in all the cases where the master has recovered damages in such an action, the injury has been occasioned to the servant by the tortious act of the defendant: I find none where the damage has arisen by means of the breach of a contract."

Compare the case of *Marshall v. York Newcastle and Berwick R.W. Co.* (1851), 11 C.B. 655. The declaration was in tort: the facts were that the plaintiff was valet to Lord Adolphus Vane, who had taken the tickets for himself and valet: the valet claimed that by the "carelessness, neglect, and default" of the railway company, a portmanteau, etc., of his were lost: he sued, claiming damages. At the trial the Chief Justice, Jervis, upon the submission of the defendants that no action lay, nonsuited the plaintiff. Upon the case coming before the full Court, the Chief Justice retracted his opinion, and was supported by the Judge forming with him that day the full Court, Williams, J., who says (pp. 663, 664): "It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* (1802), 3 East 62, and ending with *Pozzi v. Shipton* (1838), 8 A. & E. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company, as carriers." It was accordingly held that the plaintiff was entitled to the verdict.

That was the state of the law in the days in which one's rights depended, not on the facts altogether, but often very largely upon the manner in which his lawyer presented his case on paper. Under our present practice, when the battle ground is removed from the paper, and it is the facts, and not a lawyer's ideas of how the case should be reduced to writing, which govern, there is no trouble as to the frame of action. Much of the learning as to torts and contracts has become obsolete.

"It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sus-

tained whilst there by reason of the active negligence of the company's servants, whether he has a contract with them or not:" per A. L. Smith, L.J., in *Taylor v. Manchester Sheffield and Lincolnshire R.W. Co.*, [1895] 1 Q.B. 134, at p. 140; citing *Marshall's* case, *ut supra*; *Austin v. Great Western R.W. Co.* (1867), L.R. 2 Q.B. 442; and *Foulkes v. Metropolitan District R.W. Co.* (1880), 5 C.P.D. 157. And *Berringer v. Great Eastern R.W. Co.* (1879), 4 C.P.D. 163, is to the same effect.

In *Meux v. Great Eastern R.W. Co.*, [1895] 2 Q.B. 387, a servant of the plaintiff had taken a ticket for a journey on the defendants' railway, and a portmanteau of his was accepted by the defendants as his personal luggage. The portmanteau contained his livery, which was the property of the plaintiff. Through an act of misfeasance of a porter in the employment of the defendants, the livery was destroyed. It was held that the plaintiff could recover, quoting and following *Taylor v. Manchester Sheffield and Lincolnshire R.W. Co.*, [1895] 1 Q.B. 134. A. L. Smith, L.J., at p. 394, after saying that the servant could have sued either in contract or in tort, adds: "The question . . . is whether the plaintiff can sue. She has incurred loss by reason of her property having been destroyed by the active negligence of the servants of the company while it was lawfully on the premises of the company; she has therefore a right of action in tort wholly irrespective of contract. Her goods were lawfully on the defendants' premises, and by their active negligence those goods have been damaged. That gives her a good cause of action in tort."

It is needless to cite other cases, though they are not few in number.

Then the railway company cannot derive any assistance from such cases as *Bristol and Exeter R.W. Co. v. Collins* (1858), 7 H.L.C. 194. There the Great Western Railway Company had received goods at Bath to transmit to Torquay—their line stopped at Bristol, and they set over their van, under their own guard, to the line of the Bristol and Exeter Railway Company, where they were destroyed by fire. The owner of the goods sued the Bristol and Exeter Railway Company. The learned Judge left to the jury the question of fact whether the defendants had been guilty of negligence, and the jury found that they had not. The action was therefore one in contract, not in tort. Byles, Crompton,

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Williams, and Wightman, JJ., thought a contract with the Bristol and Exeter Railway Company had been established, but without conditions; Watson and Martin, BB., that there was none, but that the contract was with the Great Western Railway Company only. The Lord Chancellor, Lord Chelmsford (with whom agreed Lord Brougham), thought that the contract was entire and made with the Great Western Railway Company, but added that if the contract in any way attached to them, the conditions of the shipping bill also did. Lord Cranworth thought the only contract was with the Great Western Railway Company, as did Lord Wensleydale; and Lord Kingsdown agreed in the judgment without giving reasons. This case is remarkable for the differences of judicial opinion and its vicissitudes in the various Courts. At the trial Williams, J., had entered judgment for the plaintiff: this was unanimously set aside by the Court of Exchequer (1856, 11 Ex. 790), composed of Pollock, C.B., Alderson, Platt, Martin, and Bramwell, BB. (Parke had left this Bench in the previous month); this again was reversed by a unanimous Exchequer Chamber, Coleridge, Wightman, Cresswell, Erle, Williams, Crompton, Crowder, and Willes, JJ. (1856, 1 H. & N. 517); and this reversed by a unanimous House of Lords.

In *Coxon v. Great Western R.W. Co.* (1860), 5 H. & N. 274, as in *Mytton v. Midland R.W. Co.* (1859), 4 H. & N. 615, the frame of the action was in contract.

Failing in their contention that an action in tort does not lie against them, the defendants say that the goods in question were carried under an agreement with the express company, and that the express company had made an agreement with the plaintiff to the benefit of which they are entitled. The form of the shipping bill is as follows:—

Not Negotiable.

Read This Receipt. Form 6, Aug., '98.

THE DOMINION EXPRESS COMPANY, Limited.

RECEIVED from Benjamin Allen of Toronto.

The undermentioned articles which we undertake to forward to the nearest point to destination reached by this company, subject expressly to the following conditions, namely: This company is not to be held liable for any loss or damage, except as forwarders

only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God, or of the enemies of the Government, the restraints of Government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war. Nor shall this company be liable for any default or negligence of any person, corporation or association, to whom the below described property shall or may be delivered by this company, for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this company, and any such person, corporation or association is not to be regarded, deemed or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this company received the property below described. It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars, or of any steamboat upon which said property shall be placed for transportation; nor by the neglect or refusal of any railroad company or steamboat to receive and forward the said property.

It is further agreed that this company is not to be held liable or responsible for any loss or damage to said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants; nor in any event shall this company be held liable or responsible, nor shall any demand be made upon them beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein; nor upon any property or thing, unless properly packed and secured for transportation; nor upon any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the below described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company

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may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection, shall be that of warehousemen only. And if the articles herein mentioned are not removed from the office of the said company, and charges paid thereon in one year from the date of this receipt, it is agreed that the said company may sell the same at public auction for their charges, including the cost of sale thereon; but all articles in the opinion of the said company of a perishable nature may be disposed of at their discretion if the charges are not paid at once or the consignee cannot be found. In no event shall this company be liable for any loss or damage, unless the claim thereof shall be presented to them in writing at this office within ninety days from this date, in a statement to which this receipt shall be annexed. And it is also understood that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom, through this company, the below described property may be intrusted or delivered for transportation. The Dominion Express Company, Limited, assumes no liability for delays, losses or non-delivery beyond their lines. Deliveries at all points reached by this company are only to be made within the delivery limits established by this company at such points at the time of shipment, and prepayment in such cases shall only cover places within delivery limits. The party accepting this receipt hereby agrees to the conditions herein contained.

Date, 1907	Articles	Value	Consignee	Destination	Received by
Feby. 28	One Trunk	Prepaid	The Victor M. F. Co.	Quebec	

The particular provision in the contract to be first considered is this: "And it is also understood that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom, through this company, the below described property may be intrusted or delivered for transportation."

The defendants allege that they come within the words "com-

pany or person to whom, through this company, the below described property may be intrusted or delivered for transportation," and that the goods were, therefore, being carried by them under a special contract with the plaintiff. It will be noticed that this position is inconsistent with the first position, namely, that they had no contract with the plaintiff at all, and he has no cause of action against them. But there is nothing to prevent this stand.

The defendant who is sued for cracking a kettle which he had borrowed can still plead: (1) the kettle was cracked when I got it; (2) the kettle was not cracked when I returned it; (3) the kettle was cracked when in my possession by a thunderbolt; (4) the kettle was cracked by the plaintiff himself; and (5) the kettle was never cracked at all. A good example of multiple pleadings and issues may be found in Lord Bramwell's "Further Suggestions" submitted to the Judicature Committee in 1867: Fairfield's Memoir of Lord Bramwell, pp. 12, 13.

Nor, if it be that the goods were carried by the defendants under a special contract with the plaintiff, is his position improved by suing in tort rather than in contract. *Powell v. Layton* (1806), 2 B. & P.(N.R.) 365, at p. 370: "The form of the action cannot alter the nature of the transaction; the form of the action is originally contract; . . . though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be contract." See also *Legge v. Tucker* (1856), 1 H. & N. 500; *Morgan v. Ravey* (1861), 6 H. & N. 265; *Baylis v. Lintott* (1873), L.R. 8 C.P. 345.

And in the much canvassed case *Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663, in which the goods were received by the Lake Erie company from other railway companies under the special contracts set out in shipping bills of these companies, and the goods were destroyed by fire through the negligence of the Lake Erie company, Mr. Justice Gwynne, giving the judgment of the Supreme Court, said (p. 677): "If then the statement of claim can be construed as the statement of a cause of action arising *ex delicto* apart from any contract, the plaintiffs must fail as to those goods, for the evidence shews that the defendants received them for carriage under the terms and provisions of a special contract." The condition of the special contract insisted upon is the latter part of this sentence: "It is

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further agreed that this company is not to be held liable or responsible for any loss or damage to said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants; nor in any event shall this company be held liable or responsible nor shall any demand be made upon them beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein."

The argument that the defendants are entitled to the benefit of this condition of the special contract is based upon the case just cited of *Lake Erie and Detroit River R.W. Co. v. Sales*, 26 S.C.R. 663. The defendants, a railway company, were sued for the loss by fire of certain goods in a building owned by them at Merlin. They proved at the trial that the goods had been shipped upon other railways and by these railways delivered over to them for carriage to Merlin, and claimed the benefit of the special contracts entered into (by shipping bill) by the plaintiffs with these companies. Judgment was given against the railway company at the trial. Upon appeal to the Court of Appeal, that Court, being under the misapprehension that the shipping bills had not been relied upon at the trial, dismissed the appeal: *Sales v. Lake Erie and Detroit River R.W. Co.* (1896), 17 P.R. 224. Upon the case being carried to the Supreme Court, this mistake was pointed out, the question of pleadings threshed out, and, that Court coming to the conclusion that the defendants were entitled to the benefit of the conditions in one of the shipping bills contained, the appeal was allowed (except as to a small amount).

The particular shipping bill upon which the successful defence was based was that of the Grand Trunk Railway Company, of 1892. It will be found printed in vol. 156 of Cases in the Supreme Court in the Osgoode Hall Library, pp. 105-108, the clause of importance being clause 22 on p. 108: "22. All the provisions of this contract shall apply to and for the benefit of every carrier to whom goods may be delivered under it as fully as to the company."

Other stipulations in the same bill must, however, be considered, e.g., clause 10, p. 106: "In all cases where herein not otherwise provided the delivery of goods shall be considered com-

plete and the responsibilities of the company shall terminate when the goods . . . shall have arrived at the place to be reached on the company's railway." Clause 11, pp. 106, 107: "It is expressly agreed that the company does not contract for the carriage or delivery or safety of any goods while on lines, either by land or water, not the company's line; and where a through rate is named to any point other than a station on the company's line, the company is to act only as agent of the owner of the goods as to that portion of the said rate required to meet the charges of other carriers beyond the company's line; and if any goods be consigned . . . which the company's line does not reach, then, unless some connecting carrier be named on the other side of this document, the goods are to be handed over by the company to such carrier and at such place on the company's line as the company may select; if one be so named the company is to hand over such goods to the one so named; and in either case the company in so handing over the goods shall be held to be the agent of the owner; and the responsibility of the company in respect of any loss, etc. . . . shall cease as soon as the company shall have either delivered them to the next connecting carrier for further conveyance or notify the carrier that it is ready to do so, or in the event of want of opportunity . . . then so soon as the car containing them shall have been detached from its train at the place on the company's line whence they are to be so forwarded. . . ."

It will be seen that the Grand Trunk Railway Company was itself a carrier, and that it was recognised that goods might be shipped over that line of railway under a shipping bill, which goods were billed to a point not on the Grand Trunk Railway Company's line, but upon some other line of railway connecting directly or indirectly with the Grand Trunk Railway; that the Grand Trunk Railway Company was limiting its liability, and giving full notice that there would or might be other railways, likewise carriers, which would pick up the goods from the Grand Trunk Railway; and by clause 22 it was provided that such carriers should have the benefit of the provisions of the contract introduced primarily for the protection of the Grand Trunk Railway Company.

The Supreme Court held that the Lake Erie company, receiving

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goods under such a shipping bill, was entitled to the benefit of these provisions—no doubt, upon the ground that the contract provided expressly that the Grand Trunk Railway Company in handing such goods to the connecting carrier acted as agent for the shipper, and had, therefore, authority to make such a contract as clause 22 for him; and had done so.

Full effect must be given to this decision; and, if the present case were on all fours with the *Sales* case, these defendants should be held entitled to take advantage of the shipping bill of the Canadian Express Company, under which the goods were delivered to that company. It will, however, be necessary to examine this bill with care—remembering that this is a commercial contract and should be interpreted in a business-like sense. The express company first undertakes “to forward to the nearest point to destination reached by” the company. It is admitted that Quebec is a point reached by the company; consequently the undertaking is to carry to Quebec; and the express company is consequently the common carrier to Quebec. The company stipulates that it shall not “be liable for any default or negligence of any person, corporation or association to whom the . . . property shall or may be delivered by this company for the performance of any act or duty thereto at any place or point off the established routes or lines run by this company, and any such person . . . is not to be regarded as the agent of this company . . . but . . . the agent of the person . . . from whom this company received the . . . property. . . .” It is here contemplated that goods may be received by the company which it is desired should be carried to some place off the established routes or lines run by the company; just as in the *Sales* case the Grand Trunk Railway shipping bill contemplated another carrier. And provision is made in that, as in this, relieving the original contractor of all liability for the default of such. Then the express company’s bill goes on: “It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars, or of any steamboat upon which said property shall be placed for transportation; nor by the neglect or refusal

of any railroad company or steamboat to receive and forward the said property." That is, while the company itself is forwarding property, is itself the carrier and in possession of the goods, it can act as such carrier only by means of the facilities afforded it by the various railroad and steamboat lines—these furnish its only "means of forwarding property delivered to it to be forwarded"—and a provision is made that the company shall not suffer for any detention of the vehicle furnished it by the lines upon which vehicle the property shall be placed for transportation—not delivered over to another company for transportation, but placed by the express company for transportation, the express company still retaining possession of the property and carrying out its contract to forward to the nearest point to the destination which the company reaches by an established route or line. And, as it may be that the railway or steamboat proprietors may refuse to allow the express company to place the property upon a vehicle of theirs, and so in that sense refuse to receive and forward the property, the express company provide for that case. These are not companies to whom the express company intrusts the property—it remains in the charge and custody of the company's own servants, although it may be upon a vehicle owned and operated by another—nor is the property delivered to these companies for transportation; the property is not delivered to these companies at all in the proper sense of the words. Means of transportation are indeed furnished by the companies, but the property remains still in the possession of the express company. And an argument based upon the phrase "refusal of any . . . company to receive and forward such property," and that, as "receive" and "deliver" are correlative terms and one connotes the other, those to whom goods are said in the clause now under consideration to be delivered for transportation are the same as those who in the earlier clause are such as may refuse to receive and forward, is, to my mind, too subtle. I think that those who are to take the advantage of this clause are those to whom the goods are to be or may be intrusted or delivered for transportation beyond the regular routes of the express company and in the same way as the express company. For example, if the goods were shipped to Atlanta, Georgia, I presume some United States express company must needs take them over from the Dominion

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Express Company; and then that company would come within the protection of the clause in question.

The correlation is not *ex necessitate*; the connotation is not absolute; the refusal by a railway or steamboat line to receive the goods in the former clause is not equivalent to a refusal to accept them, nor is the refusal to forward the goods there referred to the act of a company to whom they have been "intrusted or delivered for transportation."

At the risk of being wearisome, I repeat in somewhat different language what I conceive this contract to mean. In addition to the Dominion Express Company, there are two classes of companies which are in contemplation: (1) those with which the Dominion Express Company may have to deal during the time the company is carrying upon its own established routes; and (2) those beyond the established routes to whom the Dominion Express Company will deliver for transportation off their routes and deliver to them, the deliverers being agreed to be the agents of the shipper. In respect of these latter, the Dominion Express Company refuses to accept liability for any of their defaults; but stipulates that they shall have the advantage of "the stipulation contained herein" (whatever may be the real meaning of that phrase). As to the former, the Dominion Express Company, recognising that it is the carrier, but that it can do its part as a carrier only through vehicles furnished by other companies, stipulates against—not the negligence but—the neglect or refusal to receive the property and any detention of the vehicle.

If it were considered that these defendants were within the meaning of "company . . . to whom, through this company, the . . . property may be intrusted or delivered for transportation," the question would arise whether they could take advantage of this contract, made by another company, for their benefit indeed, but without their privity.

Since *Tweddle v. Atkinson* (1861), 1 B. & S. 393, it has been clear law that, except under special circumstances, if A. make a contract with B. in favour of C., C. cannot take advantage of it in an action with B.—for want of privity. There may, of course, be special circumstances such as appear in *Gregory v. Williams* (1817), 3 Mer. 582; *Mulholland v. Merriam* (1872), 19 Gr. 288; and *Coleman v. Hill* (1885), 10 O.R. 172, 178. I have in *Kendrick v. Barkey* (1907), 9 O.W.R. 356, given some account of the cases.

The defendants in the *Sales* case based their contentions (*quorum pars magna fui*) upon the express provisions in the Grand Trunk Railway shipping bill, clause 11, that the Grand Trunk Railway Company "is to act only as agent of the owner of the goods as to that portion of the said rate required to meet the charges of other carriers beyond the company's line," and that "in . . . handing over the goods" to the connecting carrier the Grand Trunk Railway Company shall be "held to be the agent of the owner"—the argument being that the Grand Trunk Railway Company handed over the goods to the Lake Erie company under the terms of their shipping bill as agent of the owner, and consequently the owner, through his agent *pro hac vice*, entered into the contract with the Lake Erie company relied upon by them. Effect was given to this contention: see 26 S.C.R. p. 676: "The true construction of the contracts appears to me to be that thereby the consignors, whether on their own behalf or as agents of the plaintiffs, . . . undertook and agreed that delivery of the goods by the Grand Trunk Railway Company (they acting as the plaintiffs' agents) to the defendants . . . should be taken and held to be a delivery . . . to the defendants . . . upon the special terms . . . in the bills of lading issued by the Grand Trunk Railway Company." No such provision is to be found in the contract in the present case—the Dominion Express Company is not made the agent of the owner to enter into a contract for him with any other company. Even in the case of connecting carriers "the person . . . to whom the . . . property shall or may be delivered by this company for the performance of any act or duty in respect thereto," including, of course, forwarding to any point not on the established routes or lines run by the company, "is not . . . the agent of the company, but, on the contrary, such person, etc. . . . shall be deemed and taken to be the agent of the person, etc. . . . from whom this company received the property. . . ." The Dominion Express Company is neither agent nor principal of the connecting carrier, but the connecting carrier is the agent of the plaintiff. And where the stipulation is made which covers the defendants here, there is no provision for agency at all—it would be absurd to consider that when the express company placed the goods in question upon the car of the defendants they were acting as agents of the plaintiff and not as contractors with him.

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I do not enter into the inquiry whether the first of a series of connecting carriers is, in the absence of an express provision in the shipping bill, in law the agent of the shipper to make for him contracts with the succeeding carrier or carriers; and if so upon what terms. There has been no little difference of judicial opinion upon this question.

Another objection to the right of the defendants to avail themselves of the provision in the contract referred to is that the singular "stipulation" is used and not the plural. It is contended by the plaintiff that this refers to the stipulation immediately preceding only and not to the other stipulations. The defendants contend that the word is here equivalent to contract. "Stipulation" is a word derived from the Roman law; it may, indeed, mean "contract:" see *per* Wightman, J., in *Hill v. Fox* (1859), 4 H. & N. 359, at p. 364; but much the more common meaning is "item or article in a contract." I do not think it necessary to decide here as to its true meaning in this document. No doubt in fact it is a mere misprint—whatever the effect may be.

And, again, it is contended that the contract, while approved *quoad* the express company, has not been approved *quoad* the railway company—that also I do not pass upon.

No defence can be based upon the clause in the agreement between the two companies, sec. 13, that the express company "will assume all responsibility and satisfy all valid claims for the loss of or damage to express matter in its charge . . . and will hold harmless and keep indemnified the railway company against any claim . . . " for "damage . . . which may be occasioned by accidents to trains on the railway. . . . :"
Jennings v. Grand Trunk R.W. Co. (1887), 15 A.R. 477.

A number of other points argued I do not think it necessary to consider.

In case anything should ultimately turn upon any fact, I find that the evidence of the plaintiff is wholly to be relied upon.

I am satisfied with the evidence as to value.

The plaintiff will have judgment for the equivalent in our money of 16,000 francs and costs. In case the parties cannot agree as to the equivalent, I may be spoken to.

[DIVISIONAL COURT.]

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Contract—Services by Sister to Brother—Remuneration—Quantum Meruit—Statute of Limitations—Moneys Voluntarily Expended—Promise of Widower not to Re-marry—Public Policy.

The plaintiff, who was a sister of the defendant, abandoned her occupation and went to live with him in 1895, upon the death of his wife, to take care of his household and children, upon his representations that he would not marry again, that she would have a home with him for her life, unless he predeceased her, and in that event she would have the benefit of an insurance on his life effected for her benefit. There was nothing in writing, and no oral promise to pay the plaintiff wages. The plaintiff lived with the defendant and cared for his house and children until 1908, when he re-married. The plaintiff sued for damages for breach of the contract which she alleged, and for moneys expended by her on the defendant's behalf:—

Held, that the representation of the defendant that he would not marry again was merely an expression of intention; a contract of a widower not to marry again would be void as against public policy; because of the representations made by the defendant, the plaintiff was entitled to recover the value of her services for the last six years before action; but was not entitled to recover for moneys expended by her voluntarily and without the request of the defendant.

Judgment of the Judge of the County Court of Essex affirmed.

AN appeal by the plaintiff and a cross-appeal by the defendant from the judgment delivered on the 19th March, 1909, by the Judge of the County Court of Essex, sitting for ANGLIN, J.

The plaintiff (who was an unmarried woman and a sister of the defendant) sued to recover for services rendered to the defendant as his housekeeper, and for money alleged to have been expended by her on his behalf.

The defendant carried on business in the city of Windsor, and his wife died on the 28th August, 1895, leaving two infant children, one four years old and the other twenty-one months old.

The plaintiff was a seamstress living in Toronto, but at the time of the death of the defendant's wife was a visitor at the defendant's house, and she, at his (the defendant's) request, took up her residence with him at Windsor, and it is alleged that, in consideration of the plaintiff doing so and agreeing to take charge of his household affairs and the care of his children, he agreed to provide her with a comfortable home for her life; and it is alleged that the defendant further promised that he would never re-marry.

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The plaintiff also alleged that, relying on these promises, she moved to Windsor and performed the duties of the defendant's household until the 15th January, 1908, when the defendant re-married, and took up his residence elsewhere and ceased to support the plaintiff.

There was a further claim for \$1,160 alleged to have been expended by the plaintiff, since 1895, for the defendant's household expenses and dressing his children.

In his statement of defence the defendant denied the agreement to remain unmarried, and said that such agreement, if made, was void as being in restraint of marriage. The defendant set up the Statutes of Frauds and Limitations, and alleged that, if any moneys were expended by the plaintiff, it was done voluntarily and without any request on his part.

The learned County Court Judge, in his reasons for judgment, found that the plaintiff, prior to 1895, was in receipt of a moderate income from her occupation as a seamstress, which she abandoned at the request of the defendant. There was a further finding that the defendant represented to the plaintiff that he would remain unmarried, and that he had insured or would insure his life for the plaintiff's benefit; and that, relying on these representations, the plaintiff entered the service of the defendant and performed the household duties from 1895 to January, 1908, and that she expended various sums of money, amounting to \$700 at least, for the benefit of the defendant. He also found that there was no agreement to pay the plaintiff wages for her services, and that the moneys disbursed by the plaintiff for the defendant's benefit were expended voluntarily and without request on the part of the defendant. He found that the arrangement did not constitute an agreement in restraint of marriage; that the defendant voluntarily undertook to remain unmarried to insure the retention of the plaintiff in his service; "and by re-marrying the defendant has released himself from his undertaking to maintain the plaintiff in the future or to make any provision for her by will in the event of his predeceasing her." He found that the household duties which the plaintiff performed were worth \$5 per week, and directed judgment to be entered for her for \$1,530, being the amount of her wages computed for six years less forty days barred by the Statute of Limitations.

The plaintiff's motion was to set aside the judgment and for judgment for the plaintiff for an increased amount, on the ground that the Judge erred in holding that there was an understanding between the parties that if the defendant re-married at any time the plaintiff would terminate her engagement and cease to reside with the defendant, and in awarding the plaintiff damages on a *quantum meruit*, and in holding that the Statute of Limitations applied; that there was error in finding that the plaintiff was not entitled to recover in respect of the moneys expended by her for the benefit of the defendant, and that such finding was contrary to the weight of evidence; that there was error in awarding compensation to the plaintiff in lieu of the insurance the defendant had contracted to leave the plaintiff.

The defendant's cross-appeal was upon the grounds that the Judge erred in finding that there was an agreement between the parties which implied the payment of any sum of money for services performed by the plaintiff; that, if there was any agreement entered into, there was no breach thereof by the defendant which entitled the plaintiff to recover damages or wages as upon a *quantum meruit*; and that the defence of the Statute of Frauds was a bar to the plaintiff's action.

The appeal and cross-appeal were heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 7th June, 1909.

R. F. Sutherland, K.C., for the plaintiff. The plaintiff is entitled to a sum which will provide a livelihood. She put that before the defendant as a *sine quâ non*, and he agreed to it. The plaintiff was with the defendant twelve years, and the Judge has allowed for six years only. The statute does not begin to run until the breach: *Cowper v. Godmond* (1833), 9 Bing. 748. The Judge has proceeded on the basis of no express contract and has allowed a sum *quantum meruit*. The plaintiff relies upon the contract. She should also recover for the money expended.

A. H. Clarke, K.C., for the defendant. There is no contract, and the plaintiff is not entitled to anything. What she sets up is a contract not to marry, which would be void. If it is a contract for life, the Statute of Frauds applies: *Eley v. Positive Government Security Life Assurance Co.* (1875), 1 Ex. D. 20. If there

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is a contract, there has been no breach. The plaintiff would not allow the defendant to do anything for her. *Jibb v. Jibb* (1877), 24 Gr. 487, *Orr v. Orr* (1874), 21 Gr. 397, *Smith v. Smith* (1898-9), 29 O.R. 309, 26 A.R. 397, and similar cases, would apply to any statement made by the defendant as to his not marrying. She was not a servant, but went and came as she pleased. *Redmond v. Redmond* (1868), 27 U.C.R. 220, was a similar case. If the defendant had died, the plaintiff would have had no claim: *Walker v. Boughner* (1889), 18 O.R. 448; *Iler v. Iler* (1885), 9 O.R. 551. All the plaintiff is entitled to is to have the life insurance secured to her.

October 28. The judgment of the Court was delivered by MACMAHON, J. (after setting out the facts as above):—That there was no agreement that the plaintiff should be paid wages for her services is explicitly stated by the plaintiff herself in the evidence where she was asked: “Was it expected that you were to be paid for keeping house for him? Answer: No. Q. And, I suppose, if he had not married, no claim would have been made upon him for what you have done? A. No, certainly not, of course as long as he was not married. Q. And the reason that you are making claim upon him now is because he got married? A. No, it is not because he got married; he broke up the home; he left home. Q. What you mean if anything had happened to him? A. I would have taken care of the children. Q. You would not have any claim upon him then? A. How could I if anything happened to him? Q. Or happened his estate? A. He said he was well insured in my name, and if anything happened I would have nothing to do but to live on the money. Q. Do you know whether that was so or not? A. No, I never asked him any more. He said he was well insured, and that if anything happened him I would not have to work, and the insurance was in my name and my mother’s together, the first time, and then it was changed back in my name. Q. When did he tell you that? A. He didn’t tell me; some of his friends told me. Q. When did he tell you that his insurance was payable to you? A. The papers were sent to Toronto to be signed for my mother to get them signed. Q. I understood you to say that he told you that he held his insurance in your name? A. He wrote it to my sister.

Q. Did you see the letter? A. Yes, I seen the letter. Q. Have you got the letter? A. Yes. Q. Have you got it here? A. Yes, I have got it here. Q. Conversation that you speak of then was not with you? A. No, I took his word for it."

The last question was apparently not comprehended by the plaintiff, for she seemed to think that the expression "conversation" had a signification different to the defendant's "word." For the plaintiff was asked: "Q. Did he tell you those things? A. He told me that he was well insured, and that, if anything happened, there would be plenty to provide for the children and for me. Q. Now, I am asking you when he told you that? A. I think it was that first winter that I came to Windsor. Some time we happened to be talking about it that he was insured. There was an agent there, and he wanted the children insured, and Mrs. Bradley was insured, and I told him about the agent, and he said that if anything happened to him there would be plenty, that he was insured."

The plaintiff left Windsor for Toronto on the 10th September, 1895, taking the defendant's two children with her, returning to Windsor on the 4th December. She, while in Toronto, disposed of her household effects and gave up her business as a seamstress. The plaintiff, while stating that there was no agreement that the defendant should pay her wages, relies on the verbal statement made by the defendant to her that she would have a home for her life, and that he had insured his life for her benefit for a sum sufficient to support her in the event of his death, and that these were some of the inducements upon which she acted when assenting to take charge of his household. The defendant wrote to another of his sisters on the 29th September, 1905, and in the letter he speaks of the sacrifice the plaintiff is making to come and live with him; and then says: "I am well insured to provide for those dear children if I should be taken away, and for Suse (the plaintiff) also, so if any time I should be taken away Suse should not have to work any more, so what more can I do now?"

This letter was shewn by her sister to the plaintiff, who had it in her possession at the trial. And the defendant did not contradict the plaintiff's statement that he had told her (the plaintiff) that he was well insured for her benefit.

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A recent case dealing with the subject of remuneration for services rendered by one near relative for another is *Mooney v. Grout* (1903), 6 O.L.R. 521. In that case the plaintiff, a married woman, left her house at the request of her sister in November, 1901, to nurse the latter, who died in July, 1902. The deceased owned a house and lot worth \$1,800, and \$1,250 in cash and mortgages. She made a will in February, 1901, and another in February, 1902, in each of which she had given to the plaintiff the house and lot for life and the income of the money also for her life. She had told the plaintiff some months before her illness that she had made a will, and the plaintiff swore that she understood that she was to have the house and lot for her life, and that the money was to be hers absolutely. The plaintiff swore that, believing this to be the case, she had not intended to make any charge for her services to the deceased, to whom she was much attached, but that, after the death of the deceased, upon hearing the will read, she was very greatly surprised, and determined to claim to be paid. The motion was dismissed, and on appeal Mr. Justice Street, in delivering the judgment of the Court, at p. 526, said: "It is true that the plaintiff and her sister, the deceased, each had her separate household at the time the plaintiff was requested by the deceased to take care of her in her illness. Under these circumstances the presumption which arises in the case of services rendered by members of a family living together to one another, that such services are not to be paid for, does not, I think, arise. But the presumption that services rendered by one sister to another when they are not living together as members of the same family are to be paid for is much more easily rebutted than it would be if the services had been rendered to a stranger. . . . If either of them had supposed that the plaintiff was working for hire, it is but reasonable to think that the matter would have been mentioned during her nine months' attendance on the deceased. . . . I think we may properly assume under the circumstances an understanding on the part of both that the provision of the will of the deceased in favour of the plaintiff was to be her remuneration for her trouble, and that no charge would be made. This being the case, there was no contract while the services were being rendered, and the plaintiff had no right to claim pay for them upon finding that the income of the money only, and not the principal, had been bequeathed to her."

In *Murdoch v. West* (1895), 24 S.C.R. 305, Henry E. Murdoch, on his father's death, at the age of three years, went to live with his grandfather, Robert West, who sent him to school, and at the age of sixteen took him into his store, where he continued as sole clerk for eight or nine years, when West died, and Murdoch died a few days later. Both having died intestate, the administratrix of Murdoch's estate brought an action against the representatives of West for the value of such services rendered by Murdoch, and on the trial there was evidence of statements made by West during the time of such services to the effect that, if he (West) died without having made a will, Murdoch would have good wages, and if he made a will he would leave the business and some other property to Murdoch. And it was held by the Supreme Court that there was sufficient evidence of an agreement between Murdoch and West that the services of the latter were not to be gratuitous, but were to be remunerated by payment of wages or a gift by will, to overcome the presumption to the contrary arising from the fact that West stood *in loco parentis* towards Murdoch. There having been no gift by will, the estate of West was therefore liable for the value of the services as estimated by the jury, namely, at \$325 a year for 6 years—\$1,950.

In *Richardson v. Garnett* (1895), 12 Times L.R. 127, which was an action brought against the executors of the late Joseph Richardson to recover damages for breach of contract, it appeared that in February, 1891, Mr. Richardson, who was a man of considerable means, became a widower. In July, 1891, his last daughter married, and he for a short time lived alone. In August, 1891, he invited the plaintiff, who was his niece, to visit him, and, while she was with him, he proposed that she should live with him in place of the daughter who had recently married. The plaintiff was at that time a governess, earning £80 a year and contributing to the expenses of her parents' home, and, on this ground, she first doubted whether she could accept her uncle's offer. Mr. Richardson thereupon, according to the plaintiff's evidence, agreed that if she would come and live with him "he would provide for her in the future." This was the contract sued upon. In September the plaintiff decided to accept her uncle's offer, and, having given notice to her employers, wrote to Mr. Richardson informing him of her decision. He replied that he was glad she had taken

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the first step towards coming. She did not immediately go to her uncle's, and in January, 1892, he wrote stating he would allow her £10 a month and travelling expenses. In February she took up her residence at her uncle's, and remained with him eleven months, at the end of which time, in consequence of some disagreement, she ceased to live with him. Mr. Richardson died in October, 1894. Mr. Justice Cave left to the jury the question whether there was any contract between the plaintiff and Mr. Richardson. The jury found for the plaintiff, with damages £250. The Judge then ruled that there was no evidence of any contract, and entered judgment for the defendants. On appeal, Lord Esher, the Master of the Rolls, in giving judgment, said: "In this case an old man, living alone, suggested to a young lady, his niece, that she should come and keep house for him. She said she could not do so because she was earning money and in that way assisting her parents. Then he said, 'If you will come, I will provide for you,' and thereupon she went. The agreement come to in January, 1892, was quite consistent with the prior verbal contract made in August, 1891. A jury might, indeed, have held that the latter agreement was to be in substitution for the earlier one; that, however, was a question for the jury, not for the Judge. The question was rightly left to the jury, but the Judge was wrong in not entering judgment for the plaintiff in accordance with the finding of the jury."

In *Walker v. Boughner*, 18 O.R. 448, Armour, C.J., at p. 457, said: "The rule . . . seems to be that where a party renders service to another in the expectation of a legacy, and in sole reliance on the testator's generosity, without any contract, express or implied, that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies; but where from the circumstances of the case it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services."

See also the judgment of Mr. Justice Riddell in *Johnson v. Brown* (1909), 13 O.W.R. 1212.

In the present case the plaintiff was relying on the alleged promise of the defendant that he would not marry again, in which case she would have a home during her life with the defendant,

unless he predeceased her, and in that event the insurance on his life which he had promised her would enable her to live in comfort after his death.

As to the promise by the defendant not to marry again, it was merely an expression of intention on his part shortly after he became a widower, not to marry again. Had there been an agreement by the defendant not to marry again it would have been void on the ground of public policy. In the judgment of the learned County Court Judge he states that authorities were cited in support of the proposition that a widower or widow may legally contract not to re-marry. The only authority to which we have been referred in support of such contention is Pollock on Contract, 7th ed., p. 351, where it is said "that a contract by a widow or widower not to marry at all would probably be good," citing *Scott v. Tyler* (1788), 2 Bro.C.C. 431, the head-note to which is: "A condition annexed to a legacy, that the legatee shall marry with consent of her mother, is a valid condition; and upon marriage without such consent shall go to the mother, under a gift of a general residue." There is not a word in the lengthened arguments of numerous counsel or in the judgment of Lord Chancellor Thurlow which supports the statement in Pollock. In *Lowe v. Peers* (1768), 4 Burr. 2225, it was held that a contract in general restraint of marriage was void: Shep. Touchstone, 132; *Jones v. Jones* (1876), 1 Q.B.D. 279, *per* Blackburn, J., at p. 282.

The defendant offered to convey to the plaintiff a house and lot in Windsor, which he valued at \$2,200, but subject to a mortgage for \$800, in payment for her services, which the plaintiff refused to accept.

As a representation of an insurance having been effected by the defendant for the benefit of the plaintiff and that she would have a home during her life with the defendant was acted upon by the latter in taking charge of the household, I consider she is entitled under the authority of the above cases to hold the verdict given on a *quantum meruit* for the last six years of her service.

As to the moneys said by the plaintiff to have been expended by her in connection with the household expenses: the only occasion on which she spoke to the defendant of her intention to expend any of her own money was when she desired some changes made in the bath-room, which the defendant considered unneces-

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sary, but the plaintiff said she would have the changes made and pay for them herself, which she did do. When she paid for that it was voluntary, and all the other moneys which she claims to have paid out were likewise paid voluntarily, and no notification was given the defendant of such payments, and he swore that he was unaware of any moneys having been expended by the plaintiff except in the single instance of the expenditure on the bath-room.

The plaintiff was unable to give any items of sums alleged to have been expended by her for the defendant's benefit, but in the particulars furnished she gives a statement of rents received by her from property in Toronto, and from relatives, amounting in all to \$1,160, which she said was expended in assisting to support the home and family of the defendant, while she had on deposit in a bank at Windsor about the above sum.

The trial Judge was, I consider, perfectly right in disallowing this part of the plaintiff's claim.

The plaintiff may amend her pleadings and have judgment for the \$1,530 awarded her.

The result will be that the plaintiff's appeal will be dismissed without costs; and the defendant's cross-appeal will also be dismissed without costs.

[DIVISIONAL COURT.]

WHITEHORN V. CANADIAN GUARDIAN LIFE INSURANCE CO.

D. C.

1909

Oct. 28.

Life Insurance—Premium not Paid in Full at Death—Acceptance of Part after Expiry of Days of Grace—Waiver of Forfeiture—Conduct and Practice of Insurers—Estoppel.

In an action upon a policy of life insurance the defence was that the assured or the plaintiff (his wife) did not pay the quarterly premium due on the 1st September, 1908, on that date, nor within one month thereafter, the period of grace allowed by the policy, whereupon the policy lapsed, and was not revived, and was at the date of the death of the assured, the 3rd November, 1908, null and void.

The evidence shewed that the defendants, by their practice, through their agents, with the knowledge and consent of the superior officers, took money on account of premiums whenever it was given to them, whether the period of grace had expired or not; and in this case, of the \$2.55 premium due on the 1st September, \$1 was paid on the 23rd September, \$1 on the 1st October, and forty-five cents on the 24th October, these amounts being received by the defendants and carried into their books as good payments. The ten cents remaining due was, before the death, tendered to the agent to whom the plaintiff or the insured had been in the habit of paying, but was refused:—

Held, that, even if there was no tender of the ten cents before death, the defendants were not in a position to forfeit the policy; by their dealing they were estopped from saying that the policy was not a current policy on the 24th October; and the defendants could not, on their own motion and without specific warning, afterwards revive the right to forfeit for non-payment of a small balance; and their implied engagement to accept that balance within a reasonable time remained operative though death ensued.

Judgment of the County Court of Wentworth reversed.

An appeal by the plaintiff from the judgment of the Judge of the County Court of Wentworth dismissing the action, which was brought in that Court, by the widow of Harry Whitehorn, deceased, to recover \$250, the amount of a policy issued by the defendants upon the life of the deceased. The defence was that the policy was not in force at the time of the death, by reason of the non-payment of a premium.

By the terms of the policy the premium was a quarterly one of \$2.55, payable on the 1st days of March, June, September, and December. The plaintiff alleged that the defendants had waived the punctual payment of the quarterly sums, by accepting payments on account from time to time. On account of the \$2.55 due on the 1st September, 1908, \$1 was paid on the 23rd September, \$1 on the 1st October, and forty-five cents on the 24th October. The remaining ten cents was unpaid on the 3rd November, the date of the death of the assured. The plaintiff alleged that Swan, the

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agent of the defendants, had promised to call for it, but had not done so.

The action was tried with a jury, but the County Court Judge withdrew the case from the jury and nonsuited the plaintiff.

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 15th October, 1909.

J. G. Farmer, for the plaintiff. The defendants by their course of dealing with the insured had waived the right to insist on forfeiture of the policy in case the quarterly premium was not paid during the thirty days of grace, and had given him the right to pay the amount in instalments during the currency of the three months in respect of which it was payable. The case is, therefore, within the principle of *Tattersall v. People's Life Insurance Co.* (1905), 11 O.L.R. 326. I also rely on *Campbell v. National Life Insurance Co.* (1874), 24 C.P. 133, which was followed in *Horton v. Provincial Provident Institution* (1888), 16 O.R. 382, (1889), 17 O.R. 361. The case of *McGeachie v. North American Life Insurance Co.* (1893), 23 S.C.R. 148, relied on by the defendants, is not applicable, as in that case the period of extension had expired.

S. F. Washington, K.C., for the defendants. No such course of dealing as is alleged by the plaintiff has been established. The fact of waiver depends upon the intention of the party against whom the waiver is alleged, and must be the act of some one having authority in that behalf. Even if the act of the Hamilton agent of the defendants in receiving money on account of premiums after the lapse of the thirty days of grace amounted to a waiver of the condition, he had no authority to bind the defendants. The cases relied on by the plaintiff depend upon a different state of facts, and the *McGeachie* case is a complete answer to her contention. The following cases were also cited: *Wells v. Independent Order of Foresters* (1889), 17 O.R. 317, at pp. 325, 326; *Frank v. Sun Life Assurance Co.* (1893), 20 A.R. 564, affirmed (1894), 23 S.C.R. 152 n.

Farmer, in reply, cited *Refuge Assurance Co. v. Kettlewell* (1909), 25 Times L.R. 395, on the question of the authority of agents to bind an insurance company.

October 28. The judgment of the Court was delivered by BOYD, C.:—The defence is that the policy was on condition that the plaintiff should pay the annual premium quarterly on the 1st

days of March, June, September, and December, and that in breach thereof the plaintiff did not pay the quarterly premium which fell due on the 1st September, 1908, whereon the policy lapsed and became and was on the date of the death of the deceased null and void.

Another defence is set up, that the policy was subject to a further condition that grace of one month from actual date of the premium will be allowed for payment, and, should the payment not be made within the days of grace, the policy is to become void, but it may be revived within 12 months on production of evidence of continued good health and the payment of overdue premiums, and that, the premium due on the 1st September not being paid within a month thereafter, the policy became void and was not afterwards revived by production of the required evidence, etc.

The company in the correspondence take the position that the policy lapsed for non-payment on the 1st October, 1908, and had not been reinstated.

Upon the evidence I agree with the conclusion of the learned Judge that the defendants "by their practice, through their agents, with the knowledge and consent of the superior officers, took money whenever it was given to them, whether the thirty days of grace were up or not on premiums, but were not to issue the official receipt till after the whole premium was paid. . . . The practice grew up between the plaintiff and the company whereby she paid parts of the premium as she had the money, in small sums, without regard to the thirty days being up or not, but after the whole was paid the official receipt was issued without any certificate of health and without any stipulation or condition as to the retention or suspension of the insured under this policy."

The learned Judge, however, decides against the plaintiff on the single point that she had no reason to suppose that if any part of the premium was not paid within the thirty days, and death occurred before the premium was paid, the right of forfeiture was waived. In other words, the ten cents not being paid and death intervening, the company had the right to declare the policy forfeited. I think the fair reading of the evidence shews that the woman made all reasonable exertion to pay the ten cents, but was frustrated by the action or inaction of the company. The agent Swan was to return for the ten cents; he came when the family

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was out, through the money was under the butter dish waiting for him—the plaintiff sought out the place where he was supposed to be next Saturday, before the death, but did not find the agent, nor could find out where he had gone. On Monday the 2nd November, after the accident, her daughter tendered the ten cents to Swan, but he refused to take it. He says that he did so because he had ceased to be agent on the 31st October, but he did not tell her so. On Tuesday the 3rd November the death occurred. If the agency of Swan was ended, it was only fair to notify the persons insured to whom or when payments were to be made, but this was neglected, to the plaintiff's detriment.

But take it that there was no tender of the ten cents before death, were the defendants in a position to forfeit the policy? The law, whether as to insurance or other engagements, does not favour forfeitures, and here the defendants are invoking a technical triviality to escape payment.

The proposition and attitude of the defendants is that the policy lapsed or became avoided for non-payment at the end of the thirty days of grace, *i.e.*, the 1st October. Why then was forty-five cents on account of the premium received and carried into the books of the company as a good payment on the 24th October? The receipt is expressed to be on account of policy 2375, and the defendants by their dealing are, I take it, estopped from saying that it was not then a current policy, and that the money was not received on a good subsisting contract of insurance.

I read the evidence as giving the insured a reasonable time to complete the payment of the whole premium by handing in the ten cents, and that such an engagement remains operative though death ensues. There was a departure from the terms of the policy in this, that more than thirty days' grace was given—in fact one might well conclude that, if payments were being made by dribblets, it would be enough if the whole was made up during the currency of the quarter. If the strict right to forfeit at the expiry of the calendar month of grace was waived, I do not think that the defendants could, of their own motion and without specific warning, revive that right afterwards for non-payment of a small balance; but would be left to make that good out of the moneys insured, if death ensued before completion of the full payment.

Redmond v. Canadian Mutual Aid Association (1891), 18 A.R.

335, appears to justify this proposition, that the company will be estopped declaring a forfeiture if by agreement, express or to be implied from their course of conduct, they lead the insured honestly to believe that the payments, though in default, will be accepted or completed (say by driblets) after the appointed day. I may also cite as pertinent *Dilleber v. Knickerbocker Life Insurance Co.* (1879), 76 N.Y. 567, where it is said that common fairness requires that notice should be given before changing a course of conduct. The company "cannot, when their own interest seems to demand it, waive a condition, and after reliance upon it by the insured withdraw the waiver without notice:" at p. 573.

Again, it is a branch of general law that when a man has an election or option to deprive another of an existing right, before he acts he must elect once for all whether he will do the act or not. By the receipt of the forty-five cents the company elected to waive the forfeiture *quoad* that quarterly payment, and, as said by Richards, C.J., in *Black v. Allan* (1866), 17 C.P. 240, 248, the question of tender (as to the ten cents) seems to be of little consequence, for, if the doctrine of waiver applies and the right was waived, it cannot be afterwards asserted (as to that quarter), for, having waived it once, it is gone as to that particular default.

To put it in another way, the payment was received *pro tanto* up to \$2.45, and that was enough to cover a period of insurance (regarding it as divisible in the contemplation of the parties) up to and inclusive of the time when the person insured died. Upon this head I refer to *Manhattan Life Insurance Co. v. Hoelzle* (1877), 8 Ins. L. Jo. 226, affirmed in the United States Supreme Court.

Altogether I hold that the plaintiff is entitled to recover the full amount of the policy, \$250, with costs below and in appeal.

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WEBB v. BOX.

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Oct. 28.

Landlord and Tenant—Distress and Sale where no Rent Due—R.S.O. 1897, ch. 342, sec. 18 (2)—Recovery of Double the Value of Goods Sold and full Costs—Interpretation of Statutes—"May"—Relief against Penalties—Judicature Act, sec. 57 (3)—Discretion—Landlord's Bailiff—Liability—Costs of Counterclaim—Set-off.

Where distress and sale are made for rent when no rent is due to the person distraining, the owner of the goods is entitled, under R.S.O. 1897, ch. 342, sec. 18, sub-sec. 2, to recover double the value of the goods distrained or sold, and full costs of suit.

Notwithstanding that the word "may" alone is used in the sub-section, whereas "shall and may" is in the original enactment, 2 W. & M., sess. 1, ch. 5, sec. 4, there is no difference in the effect; there is no discretion in the trial tribunal to give less than double the value or less than full costs; nor is there power, by virtue of the provision in the Judicature Act, sec. 57 (3), enabling the High Court "to relieve against all penalties and forfeitures," to reduce the double value to the single value or otherwise.

The costs are fixed by the statute itself; and the discretionary power given by the Rules of Court relating to the imposition of or dispensation from costs is not exercisable in regard to costs given by statute.

The right to recover the double value not only exists against the landlord but extends to his officers and bailiffs engaged in the illegal proceedings.

The plaintiff was entitled to judgment for double the value of the goods with costs, and the defendants to judgment on a counterclaim with costs; the amounts recovered by the parties respectively for debt and costs to be set off and payment made according to the result.

Judgment of TEETZEL, J., varied.

ACTION by the assignee for the benefit of creditors of John F. Webb against Webb's landlord and others, for illegal distress.

The action was tried without a jury by TEETZEL, J., who gave judgment for the plaintiff for \$464.50 as being the value of the goods distrained, and \$175 for costs.

The plaintiff appealed to a Divisional Court, on the ground that the Judge should have given double the value and full costs of suit, under R.S.O. 1897, vol. 3, ch. 342, sec. 18, sub-sec. 2.*

The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 15th October, 1909.

C. A. Masten, K.C., and W. R. Wadsworth, for the plaintiff.

* (2) In case any distress and sale shall be made for rent pretended to be in arrear and due, when, in truth, no rent is arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, the owner of such goods or chattels distrained and sold, his executors, or administrators, may, by action to be brought against the person so distraining, recover double of the value of the goods or chattels so distrained or sold, together with full costs of suit.

The facts found by the trial Judge are undisputed, and there is no appeal as to them. He found as a fact that no rent was due at the time of the seizure, but refused to give more than the sum which he found to be the actual value of the goods seized and a fixed sum for costs. The grounds on which he based his decision were: (1) that he was not bound by the statute to award double value as damages; and (2) that, even if the statute was mandatory and not permissive, he had the right to relieve the defendants from the payment of double value under sec. 57 (3) of the Judicature Act, which empowers the Court "to relieve against all penalties and forfeitures." The Ontario statute is substantially the same as the Imperial Act 2 W. & M., sess. 1, ch. 5, sec. 4, which was the statute governing such cases until it was replaced by the Ontario Act, the only difference being that the former Act provides that the owner of the goods "shall and may" recover double value, while the latter omits the word "shall." The plaintiff contends that the omission of this word does not affect the meaning of the statute, and that cases under the old law are still applicable. If this contention is well founded, there is no doubt as to the plaintiff's right to recover double value. Foa on Landlord and Tenant, 3rd ed., p. 533, says, referring to sec. 4 of the Act of 2 W. & M.: "The above provision is absolute, so that if such action be brought successfully less damages than the double value of the goods cannot be given," citing *Masters v. Farris* (1845), 1 C.B. 715. To the same effect is Woodfall on Landlord and Tenant, 17th ed., p. 586. That the statute is remedial and not penal in its nature, and that the double value is in the nature of liquidated damages, was held in *Stanley v. Wharton* (1821), 9 Price 301. That case, it is true, was decided under a different statute, but the principle is the same. See especially the argument of Serjt. Cross in that case at p. 307, where he submits that the damages are not to be considered as "a penalty strictly speaking, but rather as a remuneration *in nomine pænæ*," which view was adopted by the Court. The word "may" in our statute does not mean that the Court is to have a discretion as to whether it will allow the double value or not, as it refers, not to the powers of the Court, but to the right of the owner. See Maxwell on the Interpretation of Statutes, 4th ed., pp. 371-374, especially at p. 374, where the case of *Morisse v. Royal British Bank* (1856), 1 C.B.N.S. 67, is referred to. In that case it was held

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that where a statute provided that the judgment creditor of a company "might" have execution against an individual shareholder, the enactment was mandatory. See also Craies on Statute Law, 4th ed., pp. 252-3, and the case there cited of *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214. The English statute was in effect re-enacted by the Ontario Legislature in 1902 by 2 Edw. VII. ch. 13. The date is important, coming as it does long after the provision of the Judicature Act under which the Court is empowered to relieve against penalties. The provision of the Judicature Act in that behalf, sec. 57, sub-sec. 3, had its origin in 49 Vict. ch. 16, sec. 38 (b), and it should be noticed that the latter statute gave power to relieve against "agreements for liquidated damages," which provision is omitted in the revised statute of 1897. The provision as it stands has no application, and never had, to a statutory compensation such as is awarded in the present case. See Craies, at pp. 73 and 428, also Maxwell, at p. 264, where it is laid down that, where a particular enactment deals with a special case, it will not as a general rule be interfered with by subsequent general legislation. *Adams v. Batley* (1887), 18 Q.B.D. 625, and *Reeve v. Gibson*, [1891] 1 Q.B. 652, were also referred to, the latter case being cited as specially relevant on the question of the power of the Judge as to costs.

G. S. Kerr, K.C., and J. C. Makins, for the defendants. The Judicature Act, sec. 57 (3), gives a Judge discretion as to whether he will award double value and full costs or not. The Interpretation Act, R.S.O. 1897, ch. 1, sec. 8 (2), states that the word "shall" is to be construed as imperative, and the word "may" as permissive, and the fact that the Ontario Legislature, when re-enacting 2 W. & M. ch. 5, sec. 4, omitted the word "shall," shews that they intended to make it clear that the provision as adopted by them was permissive only. The plaintiff, if he could hold a verdict for the double value, cannot now come to this Court to reverse the decision of the trial Judge: *Shipman v. Graydon* (1855), 5 C.P. 465. The amount awarded by the trial Judge was considerably in excess of that for which the goods were sold, and represented their full value. The plaintiff's claim as made at the trial was extravagant, and the defendants were put to great expense in procuring witnesses to shew that the valuation was excessive. Even under the English statute it was discretionary with the jury whether they would award

the double value or not, although the Judge was bound to apprise them of the law in the matter. Double value is never called liquidated damages. As to costs, there is no appeal under Rule 1130 unless where leave is granted, which is not the case here. *Jones v. Jones* (1889), 22 Q.B.D. 425, and *Pickarel River Improvement Co. v. Moore* (1896), 17 P.R. 287, and the cases there cited, were also referred to.

Masten, in reply. The use of the word "may" merely means that it is permissive to the tenant to recover the double value, and does not mean that the Court is given discretion to award less than the amount fixed. [MAGEE, J., suggested that the double value was not meant so much to increase the amount of ordinary damages as to state a limit beyond which punitive damages could not be awarded.] In the English cases the jury found the actual value, which was then doubled by the Court. Here the practice is different, and the whole matter is left to the jury. In *Bell v. Irish* (1880), 45 U.C.R. 167, and *Williams v. Thomas* (1894), 25 O.R. 536, the double value was not claimed by the plaintiff at the trial.

October 28. The judgment of the Court was delivered by BOYD, C.:—This action is based on the statute giving a right to double the value of the goods sold and full costs of suit in cases where goods are seized and sold by the landlord when no rent is due or in arrear. The case was proved to the satisfaction of the Judge, who tried it without a jury, and the value of the goods was appraised at \$464.50. He refused to give double the value, and gave a lump sum for costs. This judgment as to the value proceeded upon his understanding that the practice was not to give double the value; and as to costs, they were adjusted at a fixed sum, apparently because he allowed \$300 to the defendant as for counter-claim (part of it, \$200, not really so) and gave no costs on this head to the defendants.

The statute in question is now in the revision of Ontario statutes as R.S.O. 1897, ch. 342, sec. 18, sub-sec. 2, which is, with slight verbal variations, taken from the Imperial statute 2 W. & M., sess. 1, ch. 5, sec. 4. The English statute says the owner "shall and may" recover double value; the revision is simply "may," and it is argued that this gives discretion or latitude as to what shall be recovered. That is, it shall not be more than double the

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value, but it may be less. That does not appear to me to be a permissible deduction from the manner of treatment by the revisors, and the Ontario Legislature. Reading secs. 9 and 10 of 2 Edw. VII. ch. 13 (O.), as to the consolidation of these Imperial Acts, it is only where the provision of the revised version is not in effect the same as of the original that a difference is to be supposed in their legal operation and effect. The pruning of expletives or superfluous words is not meant to make a change in the effect of the statute. I regard the English and Canadian cases expository of the statute before its adoption in the Province as still binding as authorities. I find no trace of any practice such as is alluded to by the trial Judge. Had the case been before a jury, they would be instructed to find the value of the goods and then to give double the value, and the like instruction should be observed by any other tribunal of trial.

Then it is contended that there is power to reduce the double value to the single value or otherwise, by reason of the provision in the Judicature Act, sec. 57 (3), enabling the High Court "to relieve against all penalties and forfeitures." I tried to invoke this equitable power in a case of very great hardship whereby a penal provision in a policy of insurance would have been frustrated, but the Court of Appeal said that so to use the relieving power would be "taking a prodigious liberty with a contract."* This appears to furnish a sufficient answer to the argument of the defendants; it would be to repeal by adjudication what the Legislature has distinctly provided for, not so much in the way of penalty as to afford protection to tenants against unwarrantable seizure and sales of property to the great detriment of the tenants' rights. The language of Graham, B., regarding an analogous statute, is pertinent: "The Act of Parliament is very clearly distinguishable from those which impose penalties. I consider it entirely and purely remedial, providing, by giving double the value, for the aggravation of the injury done:" *Stanley v. Wharton*, 9 Price 301, at p. 310.

Then as to the costs, they are not in the position of ordinary costs of litigation; they are fixed by the statute itself. And the discretionary power given by the Rules of Court relating to the

* *Johnston v. Dominion of Canada Guarantee, etc., Co.* (1908), 17 O.L.R. 462, 483.

imposition of or dispensation from costs is not exercisable in regard to costs given by statute: *Reeve v. Gibson*, [1891] 1 Q.B. 652, 660.

It appears to be law that the right to recover the double value extends not only to the landlord but to his officers and bailiffs engaged in the illegal proceedings: *Hope v. White* (1866), 17 C.P. 52; so that the judgment should be varied as to all the defendants.

Altogether the correct practice is observed by Mr. Justice Cave in *Potter v. Bradley* (1894), 10 Times L.R. 445, where in a case under this statute he gave judgment for double the value of the goods with costs, and judgment for the defendants on a counterclaim with costs.

The amounts recovered by the parties respectively (using the figures of the trial Judge to ascertain the double value) for debt and costs may be set off and payment made according to the result. Costs of appeal to the plaintiff.

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[DIVISIONAL COURT.]

CLARK V. BAILLIE.

Broker—Purchase of Shares for Customer on Margin—Hypothecation—Conversion—Delivery of Shares—Trover—Damages—Misrepresentation—Interest—Payment in Excess of Legal Rate—Contract.

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The defendants, who were brokers, purchased for the plaintiff certain shares of the stock of incorporated companies; she paid them a small portion of the purchase money therefor, and owed them the balance, the defendants being entitled to hold the shares until the plaintiff paid them the amount owing in respect thereof. The defendants borrowed, on the security of these shares and of others, a sum of money in excess of the amount owing by the plaintiff. After the lapse of some months the plaintiff applied to the defendants for the shares, and, upon her paying the amount claimed by the defendants as due in respect thereof, they were at once transferred to her. At no time was delivery wrongfully withheld from her, and she sustained no actual damage because of the hypothecation of the shares. It was contended by the plaintiff, however, that upon hypothecation of the shares by the defendants there was a conversion, and that all moneys paid by her on account of the purchase money were recoverable as damages in an action of deceit—that the defendants had so dealt with the plaintiff's property that they could not, in an action of trover, be allowed to deliver the shares in mitigation of damages:—

Held, that the plaintiff was not damaged by the hypothecation of the shares, and there was, therefore, no misrepresentation which gave her a cause for action. The delivery of the shares to her annulled the effect of their previous technical conversion, and restored both parties to their former positions, thus leaving the plaintiff in debt to the defendants for the

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unpaid purchase money, in paying which she was discharging a legal liability, and therefore had no cause of action because of such payment. The plaintiff also claimed repayment of interest paid to the defendants in excess of the legal rate:—

Held, that an agreement on her part to pay the rates charged was shewn by her conduct, and, the rates being reasonable, no portion of the moneys paid on account of interest was recoverable.

Judgment of MACMAHON, J., affirmed.

AN action for damages for the conversion of and other wrongful dealings with shares of the capital stock of certain incorporated companies purchased for the plaintiff by the defendants as her brokers. The facts appear in the judgments.

The action was tried by MACMAHON, J., without a jury, at Toronto, on the 22nd, 23rd, and 30th April and 1st May, 1909.

C. Millar, for the plaintiff.

W. N. Tilley and *E. G. Long*, for the defendants.

May 31. MACMAHON, J.:—The plaintiff is a spinster and resides in Toronto. And the defendants carry on business as stock brokers in Toronto under the firm name of Baillie, Wood, & Croft.

In the year 1905 the plaintiff was the purchaser, through the defendants, of several lots of stock, notably of Sloss and Rio, on which she realised profits amounting to over \$2,000. And, from the testimony of the defendant Wood and other brokers with whom she had stock transactions, she was fully versed in the manner in which the brokerage business was conducted, and in law is taken to be aware of the usual course of dealing in such cases: *Grissell v. Bristowe* (1868), L.R. 3 C.P. 112. She knew that it was the custom of brokers to hypothecate the stock of their clients for advances up to the amount which the clients were owing them, to which she did not nor could object. Her objection was to the defendants putting her stock in with other stocks and procuring a loan on the combined securities thus hypothecated, in excess of the amount due by her on the stock she had margined. This appears to be a common method with brokers. See judgment of Lord Chancellor Halsbury in *Forget v. Ostigny*, [1895] A.C. 318, at p. 321.

The plaintiff bought from the defendants, on the 26th April, 1906, 50 shares of Sao Paulo Tramway stock at \$140 per share, amounting to \$7,000, which they agreed to carry for her on a margin of 15 per cent.

On the same day the defendants purchased the 50 shares to fill the plaintiff's order from Brouse & Co. On the 30th April the plaintiff paid \$1,200 on margin, and had from time to time between that date and the 6th March, 1907, paid further sums, amounting in the aggregate to \$1,850.

On the 26th September, 1906, the plaintiff bought from the defendants other 50 shares of Sao Paolo Tramway at 133½, amounting to \$6,675.

Between the 28th May and the 9th November, 1906, the defendants had hypothecated all their Sao Paolo stock on several occasions, and withdrew it from the pledge when they did not require the use of the money. It was hypothecated under an agreement, a form of which was furnished by Mr. E. B. Osler, the President of the Dominion Bank, which is the general form in use, as it was stated, in Toronto by banks and trust companies for such transactions.

The manner in which the hypothecation takes place by a broker, when he requires a loan, is to deposit different securities held for various clients with a bank or trust or loan company, giving them an hypothecation agreement.

The following is the form of the hypothecation agreement used by the Dominion Bank:—

“Toronto, 19 .

“To the Dominion Bank, Toronto.

“The undersigned hereby acknowledge to have received this day from the Dominion Bank as an advance the sum of dollars, which the undersigned will repay together with interest thereon at the rate of per cent. per annum, on demand after this date, at the counter of the said bank in without any presentation of this letter, demand of payment or protest for non-payment being required.

“And the undersigned having caused to be transferred to the bank or to one or more of the officers thereof in trust, the following security, namely:

to be held as collateral security for the payment of the above advance and interest, the bank is hereby authorised to sell and convey the said security whenever the bank shall think proper, upon default in the payment of the above sum and interest aforementioned,

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without the observance of any formality as above stated, and to apply the proceeds thereof towards its reimbursement, without prejudice to its claim upon the undersigned for any deficiency.

“Should the said security depreciate in value before the expiration of the above term of payment, the bank is hereby authorised to sell and convey the same without waiting the day of payment.

“It is hereby agreed that should the bank at any time determine upon a sale and conveyance of the said security, for either of the reasons above stated, such sale and conveyance may be made without notice to the undersigned of the bank’s intention so to act, the undersigned hereby expressly waiving all and every formality prescribed by any law in relation to such sale and conveyance.

“And it is further agreed that should the bank allow the undersigned to substitute for the above other collateral security, such substituted security shall be held by the bank, subject to the same terms and conditions, and with power and authority to dispose of and apply the same in the same manner as the bank could have done with the original security.

“And it is understood and agreed that the bank is at liberty to retain and use the above mentioned security (or substituted security) as collateral for any other advance or loan which has been or may be obtained from the bank, in order fully to satisfy its claims upon the undersigned.

“In case any security or substituted security transferred to or lodged with the bank is in the form of a certificate for shares or stock, with a blank transfer and an irrevocable power of attorney in blank, to transfer the shares of stock on the books of the company indorsed thereon, or attached thereto, the bank is hereby authorised, through any of its officers or employees, to fill in all blanks in the said transfer and power of attorney indorsed on or attached to each of said certificates, with such names and in such manner as may be thought best by the bank, and to re-deliver the same after such blanks have been filled in.”

Under this agreement the lender may allow the borrower to substitute other securities in place of those upon which the loan was granted.

The evidence of a number of prominent brokers of Toronto, who were called as witnesses, is to the effect that it is the invariable custom of bankers and loan companies to release any particular

security or securities included in the hypothecation agreement, on payment of the amount owing by the customer to the broker, or to substitute another security or securities for the security or securities desired to be released.

Mr. Osler, who had been a broker for forty-two years, said that these hypothecation agreements between bankers and brokers are arranged subject to the custom of which he spoke as to the substitution of other securities for those included in the hypothecation agreement, when the customer desires to pay or have it sold. As the loans are "call loans," he says the securities change from time to time—"If you sell one security, you replace it with another, if the loan is not taken up. That is the universal custom." And as to the right of the broker to hypothecate the securities of his customer up to the amount the latter owed on them, he (Mr. Osler) said that the custom of the Stock Exchange was universal and had existed so long that "the memory of man runneth not to the contrary."

The defendant Wood was examined for discovery and was asked (question 63): "Did you borrow more money upon the shares than the plaintiff owed you on them?" and he answered: "No, we didn't." And when Wood was examined at the trial, he said: "Our loans with lenders were better margined than Miss Clark's shares were margined with us." Also: "They had the right to substitute some securities for other securities at all times." And that, although the total amount of the stock which they had hypothecated was liable for a greater sum than the amount the plaintiff owed them, they do not attempt to borrow as large an amount as their clients owe them.

The defendants sent the plaintiff statements at least every three months, and thereon credits are given for the dividends received by the defendants on the Sao Paolo stock.

The first intimation given by the plaintiff of a desire to deliver the stock was on the 11th March, 1907. Sao Paolo stock had gone down to 131, and the plaintiff instructed the defendants to sell 50 shares of that stock, which they did on that day, crediting her account with the amount realised therefrom, *viz.*, \$6,537.50.

Mr. Wood at the trial said, in answer to questions by his counsel:

"Q. My learned friend read from your examination to shew that on certain dates you had your stock hypothecated? A. Yes.

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"Q. Now at other times what do you say was the condition of affairs? A. I say we had it in our vault.

"Q. To what extent had you Sao Paolo stock in your vault during the time Miss Clark was carrying Sao Paolo stock with you? A. Varying from small lots such as 25 or 50, running as high as 600 shares.

"Q. How long did that condition of affairs prevail? A. On all dates except those which Mr. Millar picked out on which our stock was hypothecated. Mr. Millar had access to our books.

"Q. That is to say, on your examination your attention was directed to the dates on which your stock was hypothecated? A. By Mr. Millar.

"Q. And then on the other dates not therein mentioned you say you had from 25 to 50 shares up to 600? A. Yes.

"Q. For the greater part of the time can you say what it would average? A. I think an average of 200 to 300 shares would be fair.

"Q. At the time the stock was sold did you have it in your vault? A. We had.

"Q. So that when Miss Clark ordered you to sell 50 shares of Sao Paolo, you filled the order how? A. On the Toronto Stock Exchange.

"Q. Where did you get the stock to deliver in pursuance of the sale? A. Got it out of our vault.

"Q. And that was the first time that Miss Clark had in any way attempted to exercise any dominion over the stock? A. That was the first time, sir.

"Q. Then on the sale of that 50 shares how many shares were left with you? A. Fifty shares were left.

"Q. Subsequently what happened about that? A. We delivered those to Messrs. Temple & Son, at Miss Clark's request.

"Q. Where did you get the shares to deliver to Temple & Son pursuant to Miss Clark's order? A. Out of our vault.

"Q. So that on the two days when Miss Clark exercised any dominion over those shares, you carried out her instructions by shares taken out of your own vault? A. We did, sir.

"Q. The Louisville and Nashville were delivered at the same time, a delivery in New York? A. Were delivered in New York, yes.

"Q. Is this the letter that Miss Clark gave you, instructing you to deliver those securities? A. That is the letter, sir."

The letter of the plaintiff to the defendants is dated the 3rd June, and directs the defendants to deliver 100 shares of Louisville and Nashville Railway Company's stock and 50 shares of Sao Paolo stock to R. H. Temple & Son, which they did on the same day. The Sao Paolo stock was sold by Temple & Son, and realised \$6,081.25, which was paid Baillie, Wood, & Croft.

It appears to be the acknowledged right of the broker to hypothecate the stock of his client, so long as it is not pledged for an amount in excess of what the client is owing him. And it is the universal custom, where stock is pledged, to allow any stock hypothecated to be released on the payment of the amount due thereon by the client, or the substitution of other security in place thereof.

As to the 50 shares of Sao Paolo stock which the plaintiff instructed the defendants to sell on the 11th March, 1908, the defendants had the 50 shares in their vault, and forthwith complied with the instructions.

I cannot see in what way the plaintiff has been damnified. Her stock was a good deal of the time unpledged, and had never been pledged by the defendants beyond the amount she was owing thereon. And I find that she could at any time while it was pledged have obtained its release by payment of the amount she was owing thereon. And when she exercised control over the first 50 shares which she required to be sold, they were at her command in the defendants' vault, and were sold the day the order for sale was given. Likewise when the plaintiff required the remaining 50 shares of Sao Paolo to be delivered to Temple & Son, they were in the defendants' vault, and were immediately delivered in compliance with her order.

In *Johnson v. Stear* (1863), 15 C.B.N.S. 330, the head-note is: "A. deposited a dock-warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock-warrant, and C. took actual possession of the brandies on the 30th:—*Held*, that the sale on the 28th, and the delivery of the dock-warrant to the vendee on the 29th—A. having the whole of that day to redeem it—amounted to a conversion. And held by Erle, C.J., Byles, J., and Keating, J., that the proper measure of damages was the actual damage A. had sustained by the wrongful

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conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal." Erle, C.J., in delivering the judgment of the majority of the Court, said (p. 335): "It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan. If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more: and that would be a nominal sum only."

In *Donald v. Suckling* (1866), L.R. 1 Q.B. 585, the plaintiff pledged, as security for the payment at maturity of a bill of exchange indorsed by him, debentures with a broker who discounted the draft. Before it fell due, the broker repledged the debentures to the defendant as security for a loan to himself larger than the amount of the plaintiff's draft. The Court refused to sustain an action of detinue for the debentures, on the ground that the plaintiff was not entitled to reclaim them until he had paid the debt to secure which they were originally given, notwithstanding the broker's violation of his duty as a bailee. The breach of duty did not terminate the bailment, but only justified, as in the principal case, an action for the damages which the plaintiff had actually suffered. Chief Justice Cockburn puts the point raised by the demurrer very clearly where he says, p. 618: "The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action,—for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged." And, at p. 619, the Chief Justice says: "It seems to me that the contract continues in force, and with it the special property created by it, until the thing

pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him."

In *Halliday v. Holgate* (1868), L.R. 3 Ex. 299, the head-note is: "A holder of scrip certificates for shares borrowed of the defendant a sum of money on his own promissory note, payable on demand, and on the security of the shares, and deposited with the defendant the scrip certificates. He afterwards became bankrupt, and the defendant, without demand and without notice, sold ten of the fifteen shares to repay himself his debt. The creditors' assignee, without making any tender of the amount of the debt, brought an action of trover against the defendant to recover the value of the shares:—*Held*, affirming the decision of the Court of Exchequer, that, even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale re-vested in the plaintiff, and that he could not therefore maintain trover, either for the whole value of the shares or for nominal damages. *Donald v. Suckling* (L.R. 1 Q.B. 585) approved." Willes, J., in delivering the judgment of the Exchequer Chamber (Willes, Blackburn, Keating, Montague Smith, and Lush, JJ.), said, at p. 301: "As to the claim for the whole value, it is certainly a strong contention. The scrip certificates were in the hands of the defendant as a security for money due, and the assignee has sustained no actual damage, for the debt could have been paid no otherwise, yet the assignee seeks to recover the whole value as if at the time the certificates were his own. It does not require much argument to shew that there is no principle for such a rule, and we should not be disposed to act upon it unless we are compelled by some authority to do so. But the authorities invite us to do the reverse, for *Johnson v. Stear* shews that if any action lies at all in such a case, the verdict can only be for nominal damages, and that an allowance must be made for the amount of the debt which has been thus satisfied, that being the amount which the pledgor or his assignee would have had to pay before he could have required the article to be delivered up. We are quite satisfied to abide by that decision."

See also the judgment of Bramwell, L.J., in *Mulliner v. Florence*

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(1878), 3 Q.B.D. 484, at p. 489; and of Lord Esher, M.R., in *Yungmann v. Briesmann* (1892), 41 W.R. 148.

The questions that arose in *Connée v. Securities Holding Co.* (1907), 38 S.C.R. 601, do not arise here. In that case no separate 300 shares of the 600 shares of stock purchased by Ames & Co. had been set apart for Connée. Connée never demanded or attempted to exercise any control over the stock he ordered. And no evidence was given as to the custom of brokers or the rules of the Stock Exchange. In the case in hand, what stock the plaintiff ordered was purchased for her, and she demanded and received the shares.

The contract was not put an end to between the plaintiff and the defendants because the defendants pledged the stock, for, as in *Halliday v. Holgate* (*supra*), the share certificates were, in the hands of the defendants, security for the balance due thereon. And, as I have already said, the plaintiff could have obtained delivery of the whole of the stock at any time on payment of the balance due, and she has suffered no damage from any act the defendants did with the Sao Paolo stock.

Then dealing with the cause of action in the 5th paragraph of the statement of claim. On the 25th August the plaintiff gave to the defendants an order to purchase for her 100 shares of the Louisville and Nashville Railway Co.'s stock, on which she agreed to pay a margin of 10 per cent. The plaintiff said she knew the purchase would have to be made by the defendants through a New York broker, and would of course be bought subject to the rules and customs of the New York Stock Exchange.

The defendants telegraphed to E. & C. Randolph, their agents at New York, who purchased on the same day (Saturday) 100 shares of Louisville and Nashville at 150 $\frac{1}{4}$, amounting with the brokers' commission to \$15,100, of which they immediately notified the defendants.

The sold note sent by the Randolphs shews on its face that the stock was bought from one Herrick, which turned out to be an error, and when the transaction reached the clearing house on Monday the 27th, the error was discovered, and as a consequence the transaction could not go through the clearing house that day. It was made manifest on Monday the 27th that the stock had been sold by Thomas McLay & Co. to E. & C. Randolph, who on the same day gave their cheque to McLay & Co. for \$15,075 therefor, which, as appeared, was paid.

The certificate for the stock was retained by E. & C. Randolph, and Mr. Abry, the manager for thirteen years of the Randolphs' business, produced a list of borrowed and loan stocks of the firm from the 25th August, 1906, to the 23rd January, 1907, and he said that they did not borrow on Louisville and Nashville stock during that period. He said that when a pledge is made by them it is for the benefit of their customer whom they represent. They borrow the money for the customer; that is the general understanding.

The defendants could have had the certificate sent to them, and they could have pledged it, but, when it was desired to sell the stock, the certificate would require to be returned to New York, and there would be the double commission to pay, and counsel for the plaintiff admitted that that would be undesirable.

The stock certificate in the hands of E. & C. Randolph formed part of the securities held by them for the amount of the defendants' indebtedness, which was \$137,909 at the close of the day on the 25th August, 1906, and fluctuated from \$80,884 in November, 1906, to \$238,345 on the 31st January, 1907.

Mr. Abry said there was sufficient balance in the defendants' account or the Randolphs would not have purchased the Louisville and Nashville stock, which when purchased was debited to the defendants. The business arrangements made by the defendants with the Randolphs were that the latter were to carry an account as general collateral loan, and buy and sell securities at the defendants' order, and the Randolphs were to hold the securities as collateral for the defendants' indebtedness, or deliver them as the defendants wished.

Abry said the general custom of the Stock Exchange was, when stocks were carried on margin, that they might be pledged, but they would not be pledged for the full amount the customer owes on them, as the banks and loan companies require a margin of 20 per cent. on stocks. He also stated that there was no record of this 100 shares of Louisville and Nashville having been hypothecated by E. & C. Randolph, and they always had on hand sufficient of that stock to deliver the 100 shares to the defendants on call, and that it was the general custom of the banks and trust companies holding stocks belonging to different customers of a broker to release any individual stock on payment of the balance due thereon

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or if not paid to allow another stock or stocks to be substituted for it.

On the 23rd January, 1907, the brokerage firm of Dann & Robinson took over the account of the defendants from E. & C. Randolph, which amounted to \$239,355, and amongst the securities Dann & Robinson received from the Randolphs was 100 shares of Louisville and Nashville stock. Dunn & Robinson had 200 or 300 shares of Louisville and Nashville stock which Mr. Robinson said were hypothecated along with the 100 shares received from E. & C. Randolph. And in borrowing on the stocks they held for the defendants, Mr. Robinson said they always borrowed in such a way that they could always get back their stocks for the amount that Baillie, Wood, & Croft owed them. The stock, Mr. Robinson said, was always absolutely under his control. And the broker had an absolute right, to have a particular stock released on payment of the balance due, or the substitution of another stock.

About the 1st June, 1907, Dann & Robinson were retiring from business, and the firm of Edward Sweet & Co., of New York, took over their Toronto business, which included the account of Baillie, Wood, & Croft, shewing the indebtedness of that firm then to be \$306,992.

Frederick Bull, a member of the firm of Edward Sweet & Co., was examined as a witness under commission. He said the account was taken over at the instance of Mr. Dann, and the 100 shares of Louisville and Nashville stock were received from Dann & Robinson as part of the securities held for Baillie, Wood, & Croft. The witness said Sweet & Co. could borrow against this stock from lenders. They could not do business if they did not. An hypothecation agreement is always signed, because the street usage is always acknowledged; it is a regular thing. This is a recognised custom of the Stock Exchange. Sweet & Co. had the 100 shares of Louisville and Nashville stock in their possession only ten days when it was delivered to Charles Head & Co. on the order of Baillie, Wood, & Croft, under the directions of R. H. Temple & Son, as per the plaintiff's letter of the 3rd June, 1907. The firm of Edward Sweet & Co. received from Head & Co. \$11,728.03 for the stock, which brought 110½. The plaintiff had, on the 3rd June, when she instructed the defendants to deliver the 50 shares of Sao Paolo and the 100 shares of Louisville and Nashville stock to Temple & Son,

delivered to the latter a statement of account which she had received from the defendants, and instructed Temple & Son to settle with the defendants on the basis of that statement, which instructions were carried out.

Charles E. Laidlaw, who was a member of the New York Stock Exchange for twenty-four years, was examined under commission, and said that, according to the custom, brokers had a right to hypothecate the stock of their customers for the balance owing by the customer thereon. And that where a block of stock is hypothecated the broker would have the right to ask any particular stock in the block to be freed and delivered on payment of the amount due thereon.

Mr. Laidlaw and other New York brokers gave evidence that the rate of interest fluctuated from time to time, and they charged the brokers for whom they did business on the Stock Exchange the same rate which their bankers charged on loans. And the Toronto brokers said they charged one-half of one per cent. additional to their customers for the trouble and expense connected with the loan. In New York interest is compounded each and every month. In Toronto the brokers compound it every three months.

As the contract was still in force between the plaintiff and defendants when the plaintiff demanded and received her stocks, and they were not at any time hypothecated for as much as the plaintiff was owing the defendants thereon, the plaintiff has suffered no damage for which the defendants are liable, and the action must therefore be dismissed with costs.

From this judgment the plaintiff appealed, and her appeal was heard on the 18th and 19th October, 1909, by a Divisional Court composed of MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

C. Millar, for the plaintiff. The defendants' obligation was twofold, to buy the stock, and to hold it for the plaintiff. On the misrepresentation of the defendants that they had done these things, the plaintiff paid the defendants moneys. The defendants never purchased the stock, or, if they did, they immediately hypothecated it for more than the plaintiff owed, which was a conversion. The plaintiff afterwards asked for and got her stock from the defendants, but at the time of re-delivery the stock was of a lower value than at the time of conversion, and the plaintiff's measure of damages

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is the difference between these two figures. The re-delivery is only in mitigation of damages. The defendants might not have been able to release the plaintiff's hypothecated shares from the bulk of their hypothecated stock without paying off the whole loan: *Conmee v. Securities Holding Co.*, 38 S.C.R. 601. As to the negotiability of shares of stock, see *Smith v. Rogers* (1899), 30 O.R. 256. Where the buying and conversion are one act, there is no purchase; there is no delivery. As to the effect of re-delivery, see *Mayne on Damages*, 6th ed., p. 417; *Sutherland on Damages*, 3rd ed., sec. 1137. The marginal writing on the bought note did not give the defendants authority to pledge: *Ames v. Conmee* (1906), 12 O.L.R. 435. Nothing was said about hypothecation at the time of the contract; and something sent to the plaintiff days after does not form part of the contract: *Lamont v. Canadian Transfer Co.* (1909), 19 O.L.R. 291; *Watkins v. Rymill* (1883), 10 Q.B.D. 178. The defendants had no right to charge the plaintiff more than the legal rate of interest: *Ames v. Conmee*, 12 O.L.R. 435. The defendants were guilty of misrepresentation and deceit in sending statements from time to time to the plaintiff representing to her that they were carrying these stocks for her.

W. C. Mackay, also for the plaintiff. *Donald v. Suckling*, L.R. 1 Q.B. 585, is distinguishable. The defendants were guilty of deceit. They should have gone into the market and bought the stocks; it was not sufficient that they had enough stocks in their vaults to fill the order: *Robinson v. Mollett* (1875), L.R. 7 H.L. 802; *Smith v. Chadwick* (1884), 9 App. Cas. 187. The plaintiff, when she took back her stock from the defendants, did not know of the conversion: *Arnison v. Smith* (1889), 41 Ch.D. 348. The burden of proof as to whom they purchased the stock from is on the defendants: *Taylor on Evidence*, sec. 376; *Dickson v. Evans* (1794), 6 T.R. 57, 59; *The King v. Turner* (1816), 5 M. & S. 206, 210, 211; *Elkin v. Janson* (1845), 13 M. & W. 655, 661; *Merchants Bank v. Clarke* (1871), 18 Gr. 594; *Bank of Montreal v. Scott* (1904), 3 O.W.R. 523. A custom of the Stock Exchange as to hypothecating can be set up only when the customer knows of its existence: *Robinson v. Mollett* (*supra*); *Ames v. Conmee* (*supra*). A broker must not gamble with a customer's stock: *Taussig v. Hart* (1874), 58 N.Y. 425.

I. F. Hellmuth, K.C., and *E. G. Long*, for the defendants. The

plaintiff has suffered no damage. The deferdants made no profit from dealing with the plaintiff's stock. There was no intent to deceive on the part of the deferdants, and therefore no action for deceit would lie. If there were any action here, it would be for conversion or breach of contract, and would entitle the plaintiff to claim damages. But the plaintiff has suffered no damage. Her shares were returned to the plaintiff when she demanded them. The onus is on her to shew that she could not get her stock at any time: *Conmee v. Securities Holding Co.*, 38 S.C.R. 601, at p. 607. Assuming that there was a conversion, the authorities make a distinction between this and any other pledge: *Johnson v. Stear*, 15 C.B.N.S. 330; *Donald v. Suckling*, L.R. 1 Q.B. 585, at p. 609; *Halliday v. Holgate*, L.R. 3 Ex. 299; *Hiort v. London and North Western R.W. Co.* (1879), 4 Ex.D. 188, at pp. 194, 195; Jones on Pledges, sec. 508. Shares are on a different footing; the identical shares need not be returned: *Price v. Gover* (1874), 40 Md. 102. The plaintiff cannot reprobate and approbate at the same time: *Mayo v. Knowlton* (1890), 10 N.Y. Supp. 230; *Conmee v. Securities Holding Co.*, 38 S.C.R. 601, at pp. 614, 619. As to dealings with a speculative customer, *Ames v. Sutherland* (1906), 11 O.L.R. 417, at p. 421.

Millar, in reply. The plaintiff was not a speculative customer. There was a conversion here. The re-delivery was only in mitigation of damages: *Sutherland on Damages*, 3rd ed., sec. 1139. Stocks are of fluctuating value. The measure of damages is the market value at the time of conversion less the market value at the time of return: *Lucas v. Trumbull* (1860), 15 Gray (Mass.) 306.

October 30. The judgment of the Court was delivered by MULOCK, C.J.:—The plaintiff brings this action to recover damages from the defendants because of their alleged dealings in respect of certain stocks known as the Sao Paolo and Louisville and Nashville stocks, which the plaintiff engaged them to purchase for her on margin, as the term is. The learned trial Judge disposed of the case adversely to the plaintiff, on the ground that she had failed to shew damage. Against this judgment she has appealed to this Court.

Her complaint as to the Sao Paolo stock is that the defendants, without her consent and in breach of their duty towards her, hypothecated it, together with other stocks in which she had no

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interest, for a bulk sum exceeding many times the amount of her indebtedness to them, and that this conduct operated as a conversion. As to the Louisville and Nashville stock, she charges that the defendants did not in fact purchase it for her, but, nevertheless, represented to her that they had done so. Ultimately, upon demand, they delivered to her agent for her the shares of the two stocks to the amount ordered by her; but, she says, did not inform her of the facts now complained of; that, in ignorance of these facts, she paid for and accepted the stocks and disposed of them; that, on discovering the facts, she considered herself entitled to damages, and accordingly brought this action.

It is beyond question that the defendants purchased for the plaintiff the Sao Paulo shares in accordance with the terms of her instructions, she paying them a small portion of the purchase money therefor, and owing them the balance, the defendants being entitled to hold these shares until the plaintiff paid them the amount owing in respect thereof. The defendants admit that they borrowed, on the security of these shares and of other stocks, a sum of money greatly in excess of the amount owing by the plaintiff.

As to the Louisville and Nashville stock, on the day of the plaintiff ordering its purchase, the defendants telegraphed instructions to a firm of brokers in New York to make the purchase, and in due course that firm sent to the defendants a bought note for the amount of shares thus ordered, whereupon the defendants represented to the plaintiff that her instructions had been complied with. It was, however, contended before us that if the New York brokers made the purchase of the Louisville and Nashville stock for the plaintiff, they, the same day, sold it, and that thereafter no Louisville and Nashville stock was held for her by the defendants or their agents. On this point it may be observed that, even if the New York brokers did sell the plaintiff's stock, still the defendants, so far as appears, were wholly unaware of the fact, and acted in perfect good faith in representing to her that the stock had been purchased and was being held for her. However, we think that the evidence shews that the New York brokers purchased for the defendants, in pursuance of the plaintiff's instructions to them, the number of shares ordered for her, and that, although they sold the particular shares so purchased, still they always held, either free from hypothecation or hypothecated, the number of shares

which the defendants had ordered them to purchase, and on account of which she paid to them a sum of money by way of margin. In this transaction, the New York brokers seem to have known the defendants only, and were carrying for them many other stocks, all of which, including the plaintiff's Louisville and Nashville shares, were being held by them as security for the whole indebtedness of the defendants to them, being an amount greatly in excess of the plaintiff's indebtedness to the defendants. After the lapse of some months the plaintiff applied to the defendants for both stocks, *viz.*, the Sao Paulo and the Louisville and Nashville, and at once, upon her paying the amount of the defendants' claim, they were transferred to her order.

The question is, to what, if any, relief is the plaintiff entitled because of the dealings of the defendants or of the firm of New York brokers with the two stocks in which she had been thus interested? In arriving at an answer to this question we assume it to be the law that the hypothecation of the plaintiff's stocks by the defendants for their own benefit for a large sum of money over and above the amount payable by the plaintiff in order to redeem her stocks operated as a conversion; but the subsequent action of the plaintiff, whether with or without knowledge of such hypothecation, in accepting delivery of these stocks and selling them, altered her legal position, and disentitled her to maintain trover. The stock which was purchased for the plaintiff was delivered to her, as already stated, the moment she demanded and paid for it. Till then she was not entitled to possession. At no time was delivery wrongfully withheld from her, and it is not suggested that she sustained any damage because of the hypothecation of the stocks.

Mr. Mackay, however, contended that upon hypothecation of the stocks by the defendants there was a conversion, and that therefore all moneys paid by her on account of the purchase money, or a sum by way of damages, are recoverable in an action of deceit. This reasoning is based upon the contention that the defendants had so dealt with the plaintiff's property that under no circumstances could they, in an action of trover, be allowed to deliver her stocks in mitigation of damages.

In a case like the present, where the plaintiff has sustained no damage, the delivery of the stocks to her, after their technical conversion, would, I think, have prevented her maintaining trover because of such conversion.

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In *Fisher v. Prince* (1762), 3 Burr. 1363, it was held that where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstance that could enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific chattel demanded may be brought into Court.

And in *Moon v. Raphael* (1835), 5 L.J.N.S.C.P. 46, which was an action of trover for the conversion of certain goods which were delivered up to the defendant after action begun, Tindal, C.J., says: "Is it not the common practice at *nisi prius* to take one shilling damages, and have the goods re-delivered?" And in the report of the same case in 2 Bing. N.C. 310, 314, he says: "If the defendants had come to the Court to stay proceedings on the delivery of the goods, the plaintiffs would not have been compelled to accept them, unless they were in the same plight as when they were taken, and no injury had accrued to the plaintiffs."

Again, in *Gibson v. Humphrey* (1833), 1 Cr. & M. 544, which was an action against a sheriff to recover the value of certain chattels, which he had seized and sold, and in which he obtained a rule calling upon the plaintiff to shew cause why, on payment of the sum realised on the sale, the action should not be stayed, Bayley, B., says: "The cases have only gone to the extent that the Court will stay proceedings on payment of costs, where the defendant restores the chattel alleged to be converted, and the plaintiff claims no special damage," etc.

Again, in *Stimson v. Block* (1885), 11 O.R. 96,103, Boyd, C., says: "The old learning on the subject of conversion need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained or in case he is wrongfully deprived of them. In all such cases the real question is whether there has been such an unauthorised dealing with the plaintiff's property as has caused him damage, and, if so, to what extent has he sustained damage?"

The cases shew the practice in England to be that where no damage by the conversion is shewn the defendant is permitted to bring the property into Court and to tender it to the plaintiff. Here, it has not been shewn that the wrongful acts of the defendants caused any damage to the plaintiff. It would have been competent for the defendants, in an action of deceit, to have set up all the facts, including the delivery of the stocks to the plaintiff, and the absence

of damage to her. Such a defence, if established, would, I think, have been an effectual bar to the plaintiff's claim for relief in such an action.

Applying that reasoning here, the plaintiff was not damaged by the hypothecation of the stocks, and there was, therefore, no misrepresentation which gave her a cause of action. The delivery of the stocks to her annulled the effect of their previous technical conversion, and restored both parties to their former positions, thus leaving the plaintiff in debt to the defendants for the unpaid purchase money, which they would have been entitled to recover in an action of debt against her. In paying the amount to the defendants, she was simply discharging a legal liability, and therefore has no cause of action because of such payment. I therefore think the learned trial Judge was right in holding that, in the absence of damage, the plaintiff was not entitled to maintain this action.

She also claimed repayment of interest paid to the defendants in excess of the legal rate. At the commencement of the transactions between the parties there was no agreement as to rate of interest to be charged to the plaintiff, but she had reason to know that the defendants would have to borrow the money, and would themselves be liable for the amounts borrowed on her account. During the continuance of the loan they charged her the rates which they themselves had to pay for her money, together with one-half per cent. by way of remuneration to themselves for their trouble and responsibility, and they continuously, during the currency of the transaction, rendered to her statements, some of which, on their face, shew the rate of interest (at 6 and at times 7 per cent.) which she was being charged. At no time did she object to these rates, but, on the contrary, from time to time made payments which covered the interest charges, and finally paid the whole amount so claimed. The rates thus charged her being reasonable, her continuing to accept the accommodation furnished to her by the defendants' borrowings on her behalf, her acceptance of the stock without complaint, and her various payments covering the interest charged without objection, are evidence of an agreement on her part to pay the rates charged. I therefore think no injustice has been done to her in the matter of interest, and that no portion of the moneys paid on account of interest is recoverable.

For these reasons this appeal should, I think, be dismissed with costs.

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[IN THE COURT OF APPEAL.]

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Oct. 30.

GORDON V. MATTHEWS.

Assignments and Preferences—Assignment for Benefit of Creditors—Promissory Note of Partnership and Members—Joint and Several or Joint Note—Claim on Estate of Partner—R.S.O. 1897, ch. 147, sec. 7—Election.

A promissory note, beginning "we promise," was signed by a partnership firm and by the two members thereof in their individual names:—

Held, that the plaintiff, the holder of the note, was entitled to rank upon the insolvent estate of one of the partners in respect of a claim upon the note.

Per OSLER, J.A., that the note was to be considered the joint and several note of the partnership and the individual members; that the claim in respect of the partnership liability must, by sec. 7 of the Assignments and Preferences Act, rank first upon the estate—the partnership estate—by which it was contracted, and the claim in respect of the individual liability, by the same section, upon the estate—the individual estate—by which it was contracted; as the individual creditor of the partner, the plaintiff could not rank on that indebtedness against the partnership estate until the partnership creditors were paid, and *vice versa*; whether, as holder of the contract of each, the section put the plaintiff to his election against which estate he would rank, it was not necessary to decide, for he had by his pleading expressly elected to rank against the individual estate, and nothing that he did in proving his claim against the partnership estate estopped him from doing so, as, even if bound to elect, he might do so at any time before the declaration of a dividend.

Per MEREDITH, J.A., that, the fact being that the debt was a debt of the firm guaranteed by one of the members of the firm, the question whether the note was a joint and several one, or merely a joint one, was not material; the plaintiff had a legal claim against the firm and a separate legal claim against the partner, although each was in respect of the same debt; and such a case is not within sec. 7 of the Act; nor is there anything in the enactment requiring an election as to which estate the plaintiff will first look to for payment.

Judgment of a Divisional Court, 18 O.L.R. 340, affirmed.

AN appeal by the defendant from the judgment of a Divisional Court, 18 O.L.R. 340, declaring the plaintiff entitled to rank as a creditor, ratably with other creditors, upon the estate of Duncan L. Myers in the hands of the defendant, as assignee of Myers for the benefit of his creditors. The facts are stated in the judgments.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 1st October, 1909.

G. C. Gibbons, K.C., for the defendant. The plaintiff's claim is based on his right to rank for a balance of \$893.20, alleged to be due upon two notes, one for \$174.50, due the 5th January, 1908, and one for \$769.70, due the 17th April, 1908. The note for \$174.50 was made by the Stratford Mill and Lumber Co., a co-partnership, and by D. L. Myers and J. Jacobs, the two persons who composed

such partnership, and, being in form "I promise to pay," was a joint and several indebtedness; but the note for \$769.70, being in the form "we promise to pay," was a joint note of the lumber company and the partners, and not a joint and several note: Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 179. See discussion in Maclaren on Bills, Notes, and Cheques, 4th ed., p. 440 *et seq.*; and in Chalmers on Bills of Exchange, 7th ed., p. 297. Upon this last note there is no right to rank on the individual estate of Duncan L. Myers, as this note is joint in form. There cannot be double proof, there cannot be a double ranking on insolvent estates: *Goldsmid v. Cazenove* (1859), 7 H.L.C. 785; *Ex p. Hill* (1837), 2 Deac. 249. This debt having been contracted by the lumber company for supplies for them, the plaintiff cannot rank on the private estate of Myers until the private debts of Myers have been satisfied: R.S.O. 1897, ch. 147, sec. 7. This section applies as well to cases where the partners individually are sureties for partnership debts, as to cases where the debtors have personal liabilities and other and distinct obligations by reason of their being members of a co-partnership: *Re Chaffey* (1870), 30 U.C.R. 64, 73; *Re Walker* (1880), 6 A.R. 169, 172. The plaintiff was bound to elect: *Re Chaffey*, *supra*; *In re Wilson* (1877), 2 A.R. 151. Until he elects he cannot bring this action. There cannot be an election where the right is claimed to rank on both estates. The plaintiff can only rank on the partnership estate: *Frost and Wood Co. v. Stoddart* (1908), 12 O.W.R. 230, 688, 1133. The assignee can only recognise the claim as filed.

R. S. Robertson, for the plaintiff. All the notes were joint and several in form except the note for \$769.70, as to which the intention was the same: *Ex p. Harding* (1879), 12 Ch.D. 557, especially at p. 567; *Ex p. Symonds* (1786), 1 Cox Eq. 200; *Thomas v. Frazer* (1797), 3 Ves. 399; *Burn v. Burn* (1798), 3 Ves. 573; *Yorks v. Peck* (1853), 14 Barb. (N.Y.) 644. The result of the defendant's contention, if given effect to, would be to deprive the plaintiff of the claim against Myers that he bargained for. It would require express statutory provision to accomplish this, and sec. 7 of R.S.O. 1897, ch. 147, was not so intended and is not so expressed. This section did not introduce any new principle into the administration of insolvent estates. The right of a person having the several liability of a partner in respect of a debt incurred for the partnership, to

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rank on the separate estate of the partner, has always been conceded, both under our own Insolvent Acts: *Re Chaffey*, 30 U.C.R. 64; and apart from any legislation: *Ex p. Clowes* (1789), 2 Bro. C.C. 595; *Ex p. Bentley* (1790), 2 Cox Eq. 218; *Ex p. Ackerman* (1808), 14 Ves. 604; *Ex p. Bevan* (1803), 9 Ves. 223; *Ex p. Harding*, 12 Ch.D. 557. If the assignee were not satisfied with the proofs of claim, he should have proceeded under sec. 21 of ch. 147. The plaintiff, if bound to elect, did so in time: *Ex p. Bevan, supra*; *Ex p. Clowes, supra*; *Ex p. Bentley, supra*. But under ch. 147 he was not bound to elect: *Ex p. Thornton* (1858), 3 DeG. & J. 454.

Gibbons, in reply. Where the plaintiff ranks on the partnership estate, he cannot rank on the separate estate. Once having elected by proving he cannot change: *Re Chaffey, supra*.

October 30. OSLER, J.A.:—It was very earnestly argued by Mr. Gibbons that the note in question in the action on which the plaintiff seeks a declaration of his right to rank against the separate estate of Duncan L. Myers was the joint and not the joint and several note of the partnership firm of the Stratford Mill and Lumber Co., and of the two partners Duncan L. Myers and J. Jacobs, who composed it. The note begins "we promise," etc., and is signed by the partnership firm and by the two partners in their individual names. I am not prepared to hold that, even were the note to be strictly regarded as the joint note of the firm and the partners, it would not be sufficient to support proof against the separate estate of each partner, as each of them, subject to the right to have his co-makers added as defendants, might be sued alone upon such a note, and proof of the joint contract would support a judgment against him, as he could not get rid of his own liability simply by proving that other persons were also liable. But, however this may be, I am of opinion that the note we are dealing with is to be considered the joint and several note of the partnership and the individual members. Had it been signed by three distinct persons, it would *primâ facie* have imported a joint contract only. But signed, as it is, by the firm and also by each partner of the firm, though commencing "we promise," etc., the case *Ex p. Harding*, 12 Ch.D. 557, is strong to shew that it imports a joint and several contract. That was the case of a guarantee, "We hereby guarantee," etc., signed by the firm and the individual partners, as here,

but the reasoning applies equally to the case of a note, and is so treated in the 5th ed. of Leake on Contracts (1906), p. 302: "Where a document, as a guarantee or promissory note, is signed in the name of a firm, and also in the names of the several individual members of the firm, it presumptively creates a joint liability of all, and a several liability of each; otherwise the signatures of the individual members would have no effect." In the case referred to, James, L.J., says (p. 564): "How is it possible to say that that is a joint guarantee, or to suppose that any man of common sense giving or receiving such a document, gave it or received it in any other sense than as creating a liability of the firm and also a separate liability of each of the other persons who signed it, distinct from and in addition to his liability as a member of the firm? That must be the meaning of it from the very nature of the case." To the same effect are the opinions of Brett and Cotton, L.JJ., the other members of the Court.

Then we have here the case of an assignor owing a debt both individually and as a member of a partnership upon the same note. The claim in respect of the partnership liability must, by sec. 7 of the Assignments and Preferences Act, rank first upon the estate—the partnership estate—by which it was contracted, and the claim in respect of the individual liability, by the same section, upon the estate—the individual estate—by which it was contracted. Neither can rank upon the other, or, as I may describe it, the opposite, estate, until after the creditors of that other have been paid in full, that is to say, as the individual creditor of Myers the plaintiff cannot rank on that indebtedness against the partnership estate until the partnership creditors are paid, and *vice versâ*. Whether, as holder of the contract of each, this section puts the plaintiff to his election against which estate he will rank, is not in this case necessary to decide: see *Ex p. Honey* (1871), L.R. 7 Ch. 178, under the Bankruptcy Act of 1869 (Imp.): for he has by his pleading expressly elected to rank against the individual estate, and nothing that he did in proving his claim against the partnership estate estops him from doing so, as, even if bound to elect, he might do so at any time before the declaration of a dividend: Robson on Bankruptcy, 7th ed., p. 727; *Ex p. Bentley*, 2 Cox Eq. 218.

The appeal must therefore be dismissed with costs.

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MEREDITH, J.A.:—When the ground is cleared so that a full view of this case is obtained, the difficulties in which, at first sight, it may seem to be beset, vanish; and it presents no question which is not easily solved.

The case is not one in bankruptcy: there are no bankruptcy or insolvency laws in force in this Province: the enactment in question is one passed by a Legislature having no power to enact bankruptcy or insolvency laws.

The actual facts in respect of the claim are that the debt is a debt of the firm, guarantied by one of the members of the firm.

The enactment in question provides that "If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors, owes, or owe, debts both individually and as a member of a co-partnership, or as a member of different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall rank on the other or others after all the creditors of such other estate or estates have been paid in full:" sec. 7, ch. 147, R.S.O. 1897.

The question whether the promissory note in question is a joint and several one, or merely a joint one, does not seem to me to have any governing effect upon the rights of the parties in this action. For the purposes of the enactment the actual position of the parties must be looked at, and that may be ascertained no matter what may be the character of their apparent obligation on the face of the instrument. That actual position is clearly such as I have already stated. But even *ex facie* the liability is not a liability of the firm only, but of the firm and of the members of it individually also, whether joint or joint and several: so that it does not merely create a debt of the firm only.

Then the plaintiff has a legal claim against the firm, and a separate legal claim against the partner Myers—although each is in respect of the same debt.

Is such a case within the enactment in question? All that the enactment requires is, that, in case of liability by the assignor individually and as a member of a firm or different firms, claims shall rank first on the estate by which the liabilities were contracted. How can that affect this case, where there are the two separate, and different, liabilities? Why may not the plaintiff, notwithstanding anything contained in this enactment, prove the separate

claim against the estate of Myers, who made himself individually liable for it: why be put upon the same footing as one who has no claim except against the firm?

The enactment is, I think, inapplicable to the case.

The general rule, even in bankruptcy, is that a joint creditor having security on separate estate of one of the partners is entitled to prove against the joint estate for the full amount of his debt without giving up his security, and *vice versa*; see *Rolfe v. Flower Salting & Co.* (1865), L.R. 1 P.C. 27. The provisions as to valuing securities under the Act in question are contained in sec. 20, sub-sec. (4).

Nor do I find anything in the enactment requiring an election as to which estate the claimant will first look to for payment. The assignee, as representing a surety merely, is of course entitled to all the equitable rights of a surety: but there is no good ground for importing into the case any bankruptcy rules, and so, with the aid of the Courts, confer power to enact bankruptcy laws upon a Province, a power which is expressly excluded from its jurisdiction. The case *Re Chaffey*, 30 U.C.R. 64, was decided upon insolvency laws then in force in Canada.

I would dismiss the appeal.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., agreed in dismissing the appeal.

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AUERBACH V. HAMILTON.

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Oct. 30.

Summary Judgment—Con. Rule 616—Setting aside Judgment—Leave to Amend Defence and File Counterclaim—Terms—Appeal—Practice—Discretion.

In an action for a money demand, after pleadings had been delivered and the defendant examined for discovery, the plaintiff moved for and obtained under Con. Rule 616 a judgment for the amount of his claim, based on the pleadings and the defendant's depositions. The defendant appealed to a Divisional Court, and at the same time moved for leave to amend his defence and to counterclaim against the plaintiff. The Divisional Court made an order directing that, upon payment into Court of the amount of the judgment, it should be set aside and the defendant allowed to amend his defence and to file a counterclaim; the defendant to pay the costs of the motion and appeal. The defendant then appealed to the Court of Appeal:—

Held, that the terms imposed upon the defendant were too onerous; they should not extend beyond what might be reasonably necessary for the protection of the plaintiff pending the final disposition of the action; otherwise they might amount to a denial of justice to the defendant.

The order was varied (MEREDITH, J.A., and RIDDELL, J., dissenting) by directing that the judgment should stand for the protection, *quantum valeat*, of the plaintiff, and that the defendant should be at liberty, upon payment of the costs of the original motion and of the appeal to the Divisional Court, to amend his defence and file a counterclaim.

Per MEREDITH, J.A., and RIDDELL, J., that the terms were in the discretion of the Divisional Court, and the only variation should be that the defendant should have leave to give security for the debt, instead of paying it into Court.

Per MEREDITH, J.A., that in matters of mere practice, and especially in matters of discretion, no encouragement should be given to appeals to the Court of Appeal.

By the statement of claim in this action the plaintiff alleged that on or about the 3rd October, 1907, the plaintiff acquired from the defendant 400 shares of the capital stock of the Canadian Oil Company Limited, of a par value of \$100 per share, amounting to \$40,000; that, in order to induce the plaintiff to accept the shares, the defendant, by an agreement in writing dated the 3rd October, 1907, agreed to pay the plaintiff interest yearly on the \$40,000 at 6 per cent. per annum for a period of 5 years from the 3rd October, 1907; that on the 3rd October, 1908, one year's interest at 6 per cent. on the \$40,000 fell due, amounting to \$2,400, but the defendant refused to pay; and the plaintiff claimed (action commenced on the 26th October, 1908) \$2,400 and interest from the 3rd October, 1908.

By the statement of defence the defendant submitted that there was nothing due and owing by him to the plaintiff under the agreement referred to in the statement of claim, and asked that the action be dismissed with costs.

The plaintiff joined issue on the statement of defence.

The defendant having been examined for discovery, the plaintiff moved under Con. Rule 616* for judgment for the amount claimed in the statement of claim, basing the motion on the pleadings and the depositions of the defendant on his examination for discovery.

The motion was heard by CLUTE, J., in Chambers, who ordered judgment to be entered for the plaintiff for the amount claimed.

The defendant appealed to a Divisional Court and at the same time asked also for an order allowing him to amend his statement of defence by setting up that he was induced to enter into the contract in question by fraud and misrepresentation, and allowing him to counterclaim against the plaintiff for moneys due and owing him by the plaintiff.

The defendant, in support of the latter application, filed his own affidavit, in which he stated that he was not indebted to the plaintiff; that at the time of the signing of the agreement sued on the plaintiff agreed to have transferred to him (the defendant) all the shares of the Hanson Consolidated Silver Mines Limited, amounting to more than 800,000 shares, but that after the signing of the agreement the plaintiff refused to transfer the stock; that at the time of the signing of the agreement the plaintiff agreed to pay one-third of all the liabilities of the Hanson company, amounting to between \$6,000 and \$7,000, but the plaintiff after the signing of the agreement refused to pay the said liabilities; that at the same time the plaintiff agreed to assist the affiant in selling and disposing of the Hanson stock in New York, and one of the reasons for the affiant entering into the agreement sued on was because of the assistance which the plaintiff promised, but immediately after the signing of the agreement the plaintiff refused to render any assistance whatsoever, and endeavoured to prevent a sale of the stock; that at the time of the signing of the agreement the plaintiff and the affiant were jointly liable to the Canadian Oil Co. in the sum of \$150,000, and the plaintiff agreed to pay one-half of the amount, but afterwards refused to do so; that subsequently pro-

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* Con. Rule 616—(1) A party may, at any stage of an action, apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, or in the examination of any other party, be entitled to; . .

(2) The foregoing Rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings;

(3) The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

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ceedings were instituted by the plaintiff to relieve him of part of his liability to the Canadian Oil Co., and in February, 1908, a settlement of all matters in dispute between the plaintiff, the affiant, and the Canadian Oil Co., was entered into; that the plaintiff was indebted to the affiant in a sum exceeding \$25,000, being for moneys advanced by the affiant on the plaintiff's behalf to pay wages, insurance, and other expenses in connection with the Hanson company, which the plaintiff agreed to pay; and that the affiant had a good defence to the action, and the application was not made for the purpose of delay.

This affidavit was answered by an affidavit of the plaintiff.

The appeal and motion were heard by a Divisional Court (MACLAREN, J.A., MAGEE and LATCHFORD, JJ.), on the 25th February, 1909, and an order was made directing that upon payment into Court by the defendant to the credit of this action of the amount of the judgment, together with interest thereon from the date of the judgment to the date of payment into Court, subject to the further order of the Court, within ten days from the date of the order, the judgment be set aside; that in that event the defendant be allowed to amend his statement of defence and to file a counterclaim therewith; that in default of such payment into Court within the time limited the appeal and application to amend be in that event dismissed; and that the defendant pay to the plaintiff the costs of the appeal and motion forthwith after taxation.

The defendant appealed from this order to the Court of Appeal, and his appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A., and RIDDELL, J., on the 27th September, 1909.

J. W. Bain, K.C., and *F. R. MacKelcan*, for the defendant. The judgment of Clute, J., should have been reversed, and the defendant allowed to defend without any condition as to payment into Court. Judgment should not be granted if there is a disputed question. There is no admission of fact in the pleadings, within the meaning of Rule 616. Judgment should be granted on summary application only in the clearest case: *Jacobs v. Booth's Distillery Co.* (1901), 85 L.T.R. 262, 50 W.R. 49. The defendant should be allowed to counterclaim: *Mersey Steamship Co. v. Shuttleworth* (1883), 10 Q.B.D. 468, 11 Q.B.D. 531; *Sheppards and Co. v. Wilkinson* (1889),

6 Times L.R. 13. If the pleading is not sufficient, it is because the plaintiff does not allege what he should in the statement of claim. The latest case is *F. J. Castle Co. Limited v. Kouri* (1909), 18 O.L.R. 462, where the defendants were allowed to defend unconditionally.

[MEREDITH, J.A., referred to *Slater v. Cathcart* (1891), 8 Times L.R. 92.]

R. U. McPherson, for the plaintiff. Another action must be brought for the next instalment, and the defendant can set up the counterclaim therein. The evidence discloses no defence to the plaintiff's claim. The matters alleged are at most only the subject of counterclaim, and the order of the Divisional Court, directing in effect that the amount of the plaintiff's judgment be retained in Court until the determination of the counterclaim, is the most favourable order to the defendant that can be made. The order was discretionary, and should not be interfered with. There is no real defence to the action. Reference to *Mellor v. Sidebottom* (1877), 5 Ch.D. 342; *In re Wright, Kirke v. North*, [1895] 2 Ch. 747, 750; *Turner v. Allday* (1836), 1 Tyr. & Gr. 819; *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17; *Clough v. London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26.

October 30. Moss, C.J.O.:—Appeal by the defendant from an order of a Divisional Court, made upon appeal by the defendant from an order pronounced by Clute, J., upon application of the plaintiff under Con. Rule 616, awarding judgment against the defendant for \$2,446.55 and costs.

The Divisional Court directed that, upon payment into Court within ten days of the amount of the judgment, with interest from its date, the judgment be set aside and the defendant be allowed to amend his statement of defence and to file a counterclaim therewith.

Upon the appeal to this Court the defendant contended that the Divisional Court should have reversed the judgment pronounced by Clute, J., and given the defendant unconditional leave to amend and proceed to trial, and in any event that the conditions imposed were more stringent and onerous than the circumstances warranted.

With regard to the order of Clute, J., it must be borne in mind that when the application was made to him matters had progressed far beyond what would have been the position if the application was under Con. Rule 603.

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Pleadings had been delivered; the defendant had filed his statement of defence and been examined for discovery. There was nothing either in the statement or the depositions to warrant the conclusion that the defendant had a good defence on the merits or had disclosed such facts as might be deemed sufficient to entitle him to proceed to trial. There was a clear admission in his depositions of the salient allegations of the statement of claim and a failure to shew any valid or substantial defence to the cause of action. And in the state of the case as it was presented to him the learned Judge properly awarded judgment against the defendant.

But the matter did not come before the Divisional Court simply as an appeal from the order of Clute, J. If it had, it would doubtless have been dismissed and properly so.

Accompanying the appeal was an application to let the defendant amend his defence and file a counterclaim and proceed to trial. This was supported by an affidavit made by the defendant, in answer to which an affidavit was filed on behalf of the plaintiff.

Upon the whole case before it the Divisional Court came to the conclusion, not that the order of Clute, J., was wrong, but that a case had been shewn for now letting the defendant in to defend the action and meet the plaintiff's claim by counterclaim. The whole matter then came to be one of terms.

In such a case the terms, in my opinion, ought not to extend beyond what may be reasonably necessary for the protection of the plaintiff pending the final disposition of the action; otherwise they may amount to a denial of justice to the defendant.

Upon consideration of the whole case, I think justice will be done by allowing the judgment to stand for the protection, *quantum valeat*, of the plaintiff, the defendant to be at liberty, upon payment of the costs of the application for judgment and the appeal to the Divisional Court, to amend his statement of defence and to file a counterclaim as he may be advised.

The costs of this appeal to be costs in the action.

The order of the Divisional Court to be varied accordingly.

In the event of the defendant failing to comply with this order, the appeal to be dismissed with costs.

OSLER, J.A.:—The defendant was in default for not having

properly pleaded his alleged defence by way of set-off or otherwise or for not having counterclaimed if he has a demand which is properly a subject of counterclaim and not merely of defence. The existence of any defence or counterclaim is but vaguely and indefinitely hinted at or foreshadowed in the defendant's examination for discovery, and therefore the judgment of Clute, J., on the motion for judgment, can hardly be said to be erroneous. But, when the matter came before the Divisional Court, where the defendant was permitted to file his affidavit setting forth his answer to the motion, it came to be simply a question of the terms on which he should be allowed to plead his defence and counterclaim, and these resolved themselves, in my opinion, into a mere matter of costs. I think no ground whatever was shewn for the imposition of such severe and unusual terms as the ordering of payment into Court of the amount of the plaintiff's claim. The only terms which should have been imposed were those of payment of the costs of the motion before Clute, J., and of the appeal to the Divisional Court. If the plaintiff thinks it worth while, the judgment may also stand as a security, *quantum valeat*. The judgment of the Court below should be varied accordingly and the costs of this appeal should be costs in the cause.

I refer to *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262 (H.L.); *Sheppards and Co. v. Wilkinson*, 6 Times L.R. 13 (C.A.); *Mersey Steamship Co. v. Shuttleworth*, 11 Q.B.D. 531 (C.A.); Yearly Practice (1909), pp. 118, 119.

GARROW, J.A., concurred.

MEREDITH, J.A.:—This case is more like one in which the appellant seeks to be let in to defend, after a regular judgment against him, than one of a motion for speedy judgment under Con. Rule 603. But in neither case is there any inflexible rule as to terms. Ordinarily the rights of the parties in the whole case—claim and counterclaim—ought to be dealt with, and the several rights adjusted, at the same time—usually at the trial. For many reasons, it is generally better that the case should not be dealt with piecemeal.

This case, however, is unusual in some respects: for instance, no counterclaim was pleaded, and, before action, in such correspondence between the parties as has been proved, no assertion,

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or suggestion, of any defence or of any counterclaim, was made in answer to a demand for payment of the claim: and it is asserted that the plaintiff's chances of recovery on his judgment will be prejudiced by delay.

Allowing the defendant to set up a counterclaim, at the last moment, was in the nature of an indulgence upon which reasonable terms might be imposed. It may be that, in the absence of proof of danger of loss by reason of the delay, I would not have imposed any such term; but it was a matter so much in the discretion of the Divisional Court that their order ought not now to be set aside; though the defendant should have leave to give security for, instead of paying into Court, the debt. No right of the defendant has been prejudiced: he is not bound to accept the order, but may bring an action to enforce his counterclaim and so avoid paying into Court, or giving security for, the debt, which he unquestionably owes. The case would be different, if the defendant had set up his counterclaim according to the practice.

With the suggested variation in the order made, I would dismiss the appeal: and feel bound to again express my opinion, that, in matters of mere practice, and especially where such matters are matters of discretion, no encouragement should be given to appeals to this Court, which perhaps are not too infrequently taken for the one real purpose of delaying the enforcement of just claims, whatever the affected purposes may be. No wrong is done to the appellant, who need not pay into Court nor give security, but can stand upon his strict rights and bring his action, instead of counterclaiming in this action. These views are emphasised by this very case, for, after all the delay and all the cost of this appeal, the defendant gets only a shadow, no more substantially than he could have had by declining to take the leave granted, upon the terms imposed, and bringing another action, because the order now made leaves the judgment he sought to set aside in full force, and him subject to any execution which may be sued out upon it.

RIDDELL, J., agreed with MEREDITH, J.A.

[IN THE COURT OF APPEAL.]

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Mines and Minerals—Mining Claim—Dispute—Status of Licensee—Decision of Commissioner—Right of Appeal—Discovery—Affidavit—Mining Act of Ontario, 1908, secs. 59 (3), 63, 151.

Section 63 of the Mining Act of Ontario, 1908, places it beyond doubt that a dispute alleging that any recorded claim is illegal or invalid, in whole or in part, may be filed by any licensee without his being entitled or claiming to be entitled to any right or interest in the lands or mining rights. And where the Mining Commissioner deals with the dispute in the first instance and not by way of appeal from the Mining Recorder's decision, an appeal from the Commissioner's decision lies under sec. 151. And *semble, per Moss, C.J.O.*, that the same right of appeal exists now, if not previously, even when the decision is upon an appeal from the Recorder.

Re Cashman and Cobalt and James Mines Limited (1907), 10 O.W.R. 658, and *Re Munro and Downey* (1909), 19 O.L.R. 249, distinguished.

Held, upon the evidence, that S. was a licensee, and entitled as such to dispute H.'s claim and to maintain an appeal against the adverse decision of the Commissioner; but that, in so far as S. claimed the right to dispute as a person entitled to be recorded as the owner or holder of a right or interest as upon a discovery followed by staking, etc., no case had been made to entitle him to such a position; and the Commissioner, in deciding the dispute based on S.'s position as a licensee, was justified in finding that H.'s claim was valid.

Semble, per Moss, C.J.O., that the mere adoption by a licensee of valuable minerals taken out by another licensee in the course of working upon a claim, at a time when he is still working it and claiming a right to do so, cannot be turned into a discovery sufficient to lay the ground-work of a claim for the benefit of the adopter—unless perhaps after an actual reverter to the Crown from some of the causes mentioned in sec. 34 of the Act. And in this case S. could not in good faith make the affidavit required by sec. 59 (3) of the Act.

Re McNeil and Plotke (1908), 13 O.W.R. 6, distinguished.

The following statement of facts is taken from the judgment of Moss, C.J.O.:—

Appeal by H. A. Smith from an order or decision of the Mining Commissioner, brought directly to this Court by leave under sec. 151 (4) of the Mining Act of Ontario, 8 Edw. VII. ch. 21.

The dispute relates to mining claim No. 10409 in the unsurveyed territory south of the township of Lorrain, of record in the office of the Mining Recorder of the Temiskaming mining division.

The claim was recorded in the office of the Mining Recorder on the 7th January, 1908, by one Montgomery, the holder of a mining license. In the application, after describing the parcel and referring to the situation of the discovery post, it is stated that the discovery was made on the 21st December, 1907, and

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the claim was staked and the lines cut and blazed on the claim "on the day of 21, 1907," but obviously the 21st day of December was intended, and no point has been made of this apparent slip.

On the 23rd May, 1908, Montgomery, being still the holder of a mining license, transferred all his interest in the mining claim 10409 to Hill, who was the holder of a mining license. This transfer was filed in the Recorder's office on the 12th June, 1908. On the 18th June, 1908, an application for the staking of a claim on the same location was filed in the Recorder's office on behalf of Smith, and on the same day a dispute of Hill's claim was filed on behalf of Smith under sec. 63 of the Mining Act of Ontario, which had come into force on the 14th April, 1908.

The Recorder, acting under the provisions of sec. 130 (2) of the Act, transferred to the Commissioner, with his consent, the questions raised by these proceedings for his decision. The Commissioner, having heard the evidence and the parties, decided in favour of Hill.

Upon appeal to a Divisional Court, a new trial was directed, upon payment by Smith of the costs of the former trial and the appeal to the Divisional Court. An application on behalf of Hill for leave to appeal from the order of the Divisional Court was refused: 12 O.W.R. 1258.

The parties then proceeded with the new trial. The Commissioner, after hearing the witnesses and the other evidence adduced, again determined in Hill's favour; and thereupon this appeal was brought.

The appeal was heard on the 5th and 6th October, 1909, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

G. T. Blackstock, K.C., for Smith, the appellant. The Mining Commissioner has found, on the authority of *Re McNeil and Plotke* (1908), 13 O.W.R. 6, that the appellant's claim is invalid, but the decision in that case is open to review by this Court, and in any event has not been correctly interpreted by the Commissioner. The respondent could acquire no better title than he obtained from Montgomery under his alleged discovery on the 21st December, 1907, and, if that is invalid, the claim is open to any one. The respondent's claim is invalid, both as having been abandoned

under sec. 83 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, and also as having become lapsed or forfeited within the meaning of sec. 34. As to the alleged findings of fact by the Commissioner on which he bases his judgment in favour of the respondent, they are not findings properly so called, but rather in the nature of a Scotch verdict of "not proven." The appellant's claim, on the other hand, is supported by undoubted evidence. The prior staking, which is relied on to preclude his claim, was not staking within the meaning of sec. 34 of the Act. As to the status of the appellant, even if he had not a specific interest in the claim, he was entitled as a licensee to question the validity of the respondent's claim.

C. C. Robinson followed on the same side, and referred to sec. 63 of the Act as putting beyond question the appellant's status, and doing away with any doubt that might be cast upon it by *Re Cashman and Cobalt and James Mines Limited* (1907), 10 O.W.R. 658.

G. H. Watson, K.C., and *J. L. McDougall*, for Hill, the respondent. The questions at issue are entirely as to matters of fact, which were expressly found in favour of the respondent in two trials. We rely on *Re McNeil and Plotke*, *supra*. The appellant may have had a *prima facie* right to appear before the Mining Commissioner, but had no right to appeal from his findings. As to a wrong date being stated for Montgomery's discovery, there is nothing in the statute to make such an error have the effect of defeating the respondent's claim, and to such a case sec. 140 of the Act is applicable. The appellant has no status whatever unless as a licensee, and the Commissioner has found that there is no evidence to that effect.

Blackstock, in reply, referred to *Coghlan v. Cumberland*, [1898] 1 Ch. 704, in regard to the power of an appellate Court to review the findings of fact in the Court below. There is no doubt that the appellant is a licensee, and, if the question had been raised at the trial, this could have easily been shewn.

October 30. Moss, C.J.O. (after setting out the facts as above):—The first question for consideration relates to Smith's status to dispute Hill's claim and to appeal to this Court. It was argued on the latter's behalf that unless Smith could shew that

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he had acquired or held an interest in the property comprised in the claim he was debarred from disputing it. And that in any event there was no appeal to this Court from the Commissioner's decision on a dispute. Reference was made to *Re Cashman and Cobalt and James Mines Limited*, 10 O.W.R. 658, followed in *Re Munro and Downey* (1909), 19 O.L.R. 249, as supporting these contentions.

In those cases the rights of the parties were governed by the Mines Act, 1906, as amended by the Act 7 Edw. VII. ch. 13. In this case, while those enactments apply to the discovery, staking, etc., made or alleged to be made by Montgomery, the Mining Act of Ontario is applicable to all the subsequent proceedings, and reference must be made to its enactments when dealing with the question of status. The language is not the same as in the former enactments, some of the changes probably owing their origin to *Re Cashman and Cobalt and James Mines Limited (supra)*. Section 63 of the Mining Act of Ontario seems to place it beyond doubt that a dispute alleging that any recorded claim is illegal or invalid, in whole or in part, may be filed by any licensee without his being entitled or claiming to be entitled to any right or interest in the lands or mining rights; while, if he claims on his own or some other person's behalf to be entitled to be recorded for, or to be entitled to, any interest, the dispute must so state. In this case the Commissioner dealt with the matter in the first instance and not by way of appeal from the Recorder, and it would seem to follow that an appeal lies from his decision under sec. 151. The same right would appear to exist now, if not previously, even when the decision is upon an appeal from the Recorder. It must be taken as proved, or not really open to dispute, that Smith and O'Hara, who filed the application and dispute, were licensees, and therefore entitled on that ground to dispute Hill's claim and to maintain this appeal against the adverse decision of the Commissioner. But, in so far as Smith claims the right to dispute as a person entitled to be recorded as the owner or holder of a right or interest as upon a discovery followed by staking, etc., no case has been made to entitle him to such a position.

On the 17th June, 1908, on which day Smith or O'Hara on his behalf alleges that he discovered valuable mineral and staked out the claim upon the lands comprised in it, the same claim was

under staking and record as a mining claim filed by Montgomery, duly transferred for valuable consideration to Hill, and upon it men in Hill's employ were then actually engaged in working.

The onus being upon Smith to shew, if he could, that valuable mineral in place had been discovered by him or on his behalf on land open to prospecting (sec. 35), he could only do so in this instance by shewing that Hill's claim had lapsed, been abandoned, cancelled, or forfeited (sec. 34). And in this respect he has wholly failed. There was no abandonment of Hill's claim under the provisions of either sec. 82 or sec. 83, nor is there any evidence—but the contrary—of conduct amounting to an abandonment, even if in the face of these enactments any other form of abandonment can be put forward.

Cancellation under sec. 91, or forfeiture under sec. 85, is equally out of the question. Nor upon the evidence can there be any reasonable suggestion of a lapse. That is something which must occur, if at all, by reason of omissions entitling the Crown, if it chooses, to resume the land, or of some course of conduct indicating an intention on the part of the person holding the claim to permit the lands to revert to the Crown. Whether or not there has been a lapse is a question of fact, and the evidence here does not justify a finding that on or before the 17th June, 1908, Hill's claim had lapsed.

The lands comprised in the claim were, therefore, not lands open to prospecting under sec. 35. In view of this, it is perhaps unnecessary to deal at any length with the contention that a discovery had been made by or on behalf of Smith. But, speaking for myself, I perceive much difficulty in holding that the mere adoption by a licensee of valuable minerals taken out by another licensee in the course of working upon a claim, at a time when he is still working it and claiming a right to do so, can be turned into a discovery sufficient to lay the ground-work of a claim for the benefit of the adopter. If it could ever be so, probably it could only be after there had been an actual reverter to the Crown from some of the causes mentioned in sec. 34.

I am inclined to accept the view taken in the Courts of British Columbia under the legislation of that Province: see *Cranston v. English Canadian Co.* (1900), 1 Martin's Mining Cases 394.

In *Re McNeil and Plotke*, 13 O.W.R. 6, Riddell, J., delivering the

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judgment of a Divisional Court, expressed the opinion that a licensee seeing a claim apparently regularly staked might, nevertheless, by reason of knowledge as to the actual state of the case, be able to make the affidavit required by sec. 157 of the Mines Act of 1906, as amended by the Act of 1907.

But I am not able to think that either Smith or O'Hara, knowing what they did in this case, could justly claim to be able in good faith to make the affidavit required by sec. 59 (3) of the Act of 1908.

There remains to be considered the question whether the dispute based on Smith's or O'Hara's position as licensee has been established.

I agree with the conclusion of the Commissioner. In my opinion, he was justified in concluding that upon the evidence adduced it would be very unsafe to find against the validity of Montgomery's claim.

The circumstances developed in the course of the testimony were calculated to cast the gravest doubt upon the testimony put forward in support of Smith's contention, and he did not offer himself as a witness. Reading the testimony of the witnesses upon whom he relies, it appears to me so far from being satisfactory or convincing that I feel no hesitation in saying that there appears to be no sufficient ground for yielding to the argument that the view taken of it by the Commissioner should be reversed or varied on this appeal.

I would dismiss the appeal with costs.

MEREDITH, J.A.:—The appellant must recover, if he can recover at all, upon the strength of his own rights, under the Mining Act, not on the weakness of the respondent's; but, apart from recovering himself, he may, in my opinion, dispute the respondent's claim, with a view to defeating it, even though his own claim be invalid. Section 63 of the Act seems to me to make that quite plain. But it is said that no appeal lies from the Commissioner to a Divisional Court, or to this Court, by one who merely disputed the claim. Section 151, however, gives such a right of appeal, in plain words, and nothing contained in it gives colour for any distinction between cases in which the appellant is seeking to enforce some claim and where he is merely opposing the claim

of another. Section 133 applies only to the case of an appeal from the Recorder to the Commissioner, and, if it had been applicable to this case, it might not have been found difficult to point out how any licensed prospector may be affected by a claim which is intended to withdraw the land in question from prospectors' rights under the Act; but perhaps more difficult to give any satisfactory reason why a person who is given a right to dispute a claim is not affected by a dismissal of his objection. Nor difficult to find a party adversely interested in the claimant.

Again, it must be borne in mind that mining lands are not lands without an owner which must be awarded to one or other of the parties to cases such as this. The lands are Crown lands and remain such until they are acquired in the manner provided for in the Act. So it may be that neither party is entitled to any rights in the land in question. That the appellant is not seems to me to be quite plain. The whole evidence makes it quite plain that he made no discovery such as the Act contemplates. His only discovery was of defects in the respondent's title which he sought to take advantage of, not only to defeat the respondent's claim, but also to give title to himself.

Section 35 provides that "a licensee who discovers valuable mineral in place" may acquire rights under the Act; and sec. 2, sub-sec. (x), that "valuable mineral in place" shall mean a vein or lode or deposit of mineral in place appearing at the time of discovery to "be of such a nature. . . ."

I cannot think that on the facts of this case there was any such discovery by the appellant.

The appellant's claim therefore fails.

In regard to the respondent's claim I would have had great difficulty in coming to the conclusion which the Commissioner reached, upon the whole evidence as it now appears; but he had the great advantage of hearing and seeing the witnesses, and the knowledge which the local atmosphere affords; so great an advantage that, being unable to demonstrate his error, if such there be, it must stand, so far as I am concerned, and that even though it seems to me that his mind may have been affected by the notion that either one or the other of the parties must succeed in his claim to the land; and, in such an event, the leaning would be very strong towards the respondent.

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He has found that there was a valuable discovery by Montgomery, duly followed up under the provisions of the Act.

I would dismiss the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

Meredith, J.A.

[IN THE COURT OF APPEAL.]

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ROSS V. CHANDLER.

Partnership—Cheque Payable to Firm—Indorsement and Deposit by Partner in Bank to Credit of another Firm—Liability of Bank to Partner Deprived of Proceeds—Acquisition of Cheque—Conversion—Breach of Trust—Notice—Findings of Trial Judge—Absence of Negligence—Bona Fides.

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C., a member of a partnership of R. M. & C., received a cheque payable to the firm for a large sum due to the firm, and indorsed it in the name of the firm, which he had a right to do. Instead, however, of depositing the cheque to the credit of the firm or cashing it and applying the proceeds for the benefit of the firm, he and M., without the knowledge or consent of R., took the cheque to a bank, where they opened an account in the name of a new firm, M. C. & M., of which they were members, and handed the cheque to the bank, indorsed also in the name of the new firm; the bank at once credited the new firm with the amount of the cheque. The assistant general manager of the bank, with whom the business was transacted, made no inquiries of any kind as to the old firm or the new firm. The trial Judge found no negligence and good faith on the part of the bank:—

Held, that the transaction was a discounting or purchase of the cheque by the bank; that the trial Judge's findings were supported by the evidence (OSLER, J.A., *dubitante*); and that without proof of negligence and bad faith the plaintiff, R., was not entitled to succeed against the bank in an action for conversion of the cheque or misapplication of it in breach of trust.

Capital and Counties Bank v. Gordon, [1903] A. C. 240, and *Ex p. Darlington District Joint Stock Banking Co.* (1865), 4 D. J. & S. 581, 11 Jur. N.S. 122, distinguished.

ACTION by one Ross, a member of the firm of Ross, McRae, & Chandler, against his partners, McRae and Chandler, and the Imperial Bank of Canada, for the alleged conversion of a cheque for \$56,251.27 and to compel payment of that sum into Court, in the circumstances mentioned in the judgments.

The action was tried before RIDDELL, J., without a jury, at Toronto, on the 18th June, 1908.

G. F. Shepley, K.C., and G. W. Mason, for the plaintiff.

H. E. Rose, K.C., for the defendants McRae and Chandler.

J. Bicknell, K.C., and *A. B. Morine*, K.C., for the defendants the Imperial Bank of Canada.

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June 20, 1908. RIDDELL, J.:—In the year 1905 the plaintiff and the defendants McRae and Chandler formed a partnership upon terms set out in partnership articles dated the 18th December, 1905. Amongst other provisions were the following: "6. Neither partner shall draw any moneys from the business other than the said salary as herein mentioned until the whole contract is wound up. 7. Neither partner shall use any moneys, securities, or any property of the co-partnership, or in any way pledge the credit of the co-partnership, or use the co-partnership name, except for the necessary and proper purposes of the partnership." And provision was made for taking an account of the affairs of the partnership upon the completion of a contract then in hand for building twenty-three miles of railway from Three Rivers to Shawinigan Falls, and for a division of the profits.

When this contract was on the way towards completion, Ross, who had been looking after the practical work of construction, left and went to this Province; Chandler remained and saw the contract finished, and received a cheque payable to the order of the firm, "Ross, McRae, & Chandler," for the sum of \$56,251.27. He and McRae had formed a new partnership with one McNeil under the firm name of McRae, Chandler, & McNeil. In March, 1907, McRae and Chandler went into the head office of the Imperial Bank in Toronto and had an interview with Mr. Hay, the assistant general manager of the Imperial Bank. McRae was known to Hay, and introduced Chandler and Hay to each other. Chandler informed Hay that "they" had just completed a contract at Shawinigan, and were about to commence another contract on the Temiskaming Railway, and said that "they" would like to open an account with the Imperial Bank, which had an office at New Liskeard. Hay saw a chance of increasing the circulation of his bank's notes in the New Ontario, and readily agreed. The arrangement was made to open a credit for the firm of McRae, Chandler, & McNeil. Hay made no inquiry as to this firm, and nothing was said which would lead him to believe that Ross had any interest in this firm. It is quite plain that Hay made no inquiries of any kind about the new firm or about any firm or about who had an interest in the new contract.

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The cheque was indorsed by Chandler in the name of Ross, McRae, & Chandler, adding his own name, and then the name of McRae, Chandler, & McNeil, adding his own name again; and it was handed to the Imperial Bank, and at once the firm of McRae, Chandler, & McNeil was credited with the amount. The cheque, which was drawn on the Bank of Montreal, Montreal, was sent by the Imperial Bank to Montreal, and there collected.

Ross in the meantime had expected that Chandler would collect the amount of the cheque, and, after paying any outstanding liabilities of the firm, divide the profits. He did not know of, and would not have assented to, the disposition of the cheque already set out.

This action was brought on the 7th January, 1908, by Ross, as plaintiff, against Chandler, McRae, and the Imperial Bank, as defendants, claiming that the bank should be ordered to pay the said sum of \$56,251.27 and interest into Court to the credit of the firm of Ross, McRae, & Chandler. On the 18th December, 1907, an action had been brought by Ross, as plaintiff, against McRae, Chandler, & McNeil Company Limited, amongst other things claiming a winding-up of the partnership of Ross, McRae, & Chandler and the taking of the partnership accounts of that firm. All parties are content that an order shall now be made in that action in the usual form—and I so order. All the money in question was paid out on the order of the new firm by the 9th July, 1907.

As to the present case, a number of points of more or less difficulty must be considered.

The transaction was a discounting, *i.e.*, a purchase, of the cheque by the bank: the money placed to the credit of the new firm would, no doubt, not be paid out if the cheque for any reason were dishonoured, but that circumstance does not alter the transaction itself.

Had, then, the bank the right to acquire the cheque, to make it the property of the bank, under the circumstances of this case?

It is argued that the facts bring the case within the authority and principles of the well-known decision of Lord Westbury, L.C., in *Ex p. Darlington District Joint Stock Banking Co.* (1865),¹ 4 D.J. & S. 581, 11 Jur. N.S. 122. The Lord Chancellor (11 Jur. N.S. at p. 123) says: "Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes

If the business of the partnership be such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority, unless they have notice, or reason to believe, that the thing done in the partnership name is done for the private purposes or on the separate account of the partner. In that case, authority, by virtue of the partnership contract, ceases; and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority; otherwise he must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud. These principles have been established by a long series of decisions—if, indeed, decisions were at all required to shew the proper application of the rule of law, which is so plain and obvious . . .” And, after quoting *Leverson v. Lane* (1862), 13 C.B.N.S. 278, as approving what is said in Smith’s Mercantile Law, *viz.*—“It would seem that the unexplained existence of a partnership security, received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence which amounts to fraud, that it is incumbent on the party who takes the security to remove, by shewing either that the party from whom he received it acted with the authority of the rest of the partners, or that he himself had good reason to believe that was the fact”—the Lord Chancellor goes on to say: “It is immaterial whether the partnership security is applied in discharge of an existing debt, or whether it is used by the individual partner for the purpose of obtaining money to be applied for his own personal purposes. . . . The transaction, therefore, was plain on the face of it, that the partnership security was converted by the individual partner into his own private personal property, in order to be converted to his own private purposes; the bank receiving such bills, and discounting them at the instance of the individual partner, with whom they had an account. . . . I cannot put their case higher than the right of the individual partner with whom they dealt, and they can have no claim to be compensated by the partnership, unless that be the right of the individual with whom they have so dealt.”

It is true that in that case the bills purp^orted to be drawn and

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indorsed by the firm, and consequently there was a claim against the partnership upon the bills themselves. But I think that the principle remains the same—no one may with impunity take from one partner an asset of the firm “for the purpose of obtaining money to be applied for his own personal purposes,” or with a knowledge that it is not to be applied for the purposes of the partnership.

But, as it seems to me, there must be something in the transaction more than the mere fact that it appears that the partner is obtaining the money, or even that he is paying the money to a firm of which he is a partner and the others are not; there must be something suspicious, something to shew or indicate that the firm is not getting the benefit of the payment.

In the *Darlington* case, Kay, the wrongdoing partner, himself wrote the signature of the firm to the bills, in the same way he indorsed the partnership name, indorsing the bills to himself, and then he negotiated the bills with the bank in his own name, the proceeds going to his own private account, though the firm had, as the bank knew, their account at another bank. The Lord Chancellor says (4 D.J. & S. at p. 587): “The appellants themselves were undoubtedly guilty of great negligence. They must have seen on the face of the bills that they had been called into being by the individual partner who wrote the partnership name originally at the foot of the bills; that the same hand wrote also the indorsements, and that the same hand added the individual name of Kay. On the face of the transaction, therefore, it was plain that the partnership security was converted by the individual partner into his own private personal property, in order that it might be applied to his own private purposes, and yet the appellants received such bills and discounted them at the instance of that individual partner with whom they had an account, knowing full well that the firm itself had a proper bank of its own with which the ordinary partnership account was kept.”

The facts of the present case are very near those of the *Darlington* case, but I think there is enough to differentiate the two and to bring this case within the protection of the rule in *Leverson v. Lane*. I think it is enough that the bank shew that they had reason to believe that the transaction was an honest one.

McRae was known to Hay; Chandler was also known by repute

as being an honourable business man; they told Hay that they had just completed a contract down east, and that they were about to commence another on the Temiskaming Railway, and would like to open an account by depositing a considerable sum of money, represented by a cheque from the St. Maurice Construction Company. Hay knew that it is not an uncommon thing for contractors to take contracts under different names; had known of such cases personally, as such methods are often pursued; it never occurred to him to ask for an explanation of the fact that a cheque payable to the order of Ross, McRae, & Chandler, or the proceeds of such cheque, were to be paid to the order of McRae, Chandler, & McNeil, though nothing was said to lead him to believe that Ross had any interest in the firm of McRae, Chandler, & McNeil. I am unable to find gross negligence here or any negligence. It is apparent that Hay supposed that the old firm were going on under a new name. No possible imputation of fraud or unfair dealing, wilful blindness, or any impropriety, can successfully be made against Hay, whose good faith in this transaction is above suspicion. Such being the case, I think the bank have made out that they had reason to believe that Chandler was acting within his authority.

The case is not unlike (though much weaker for the plaintiff) *Murphy v. Camden* (1853), 18 Mo. 122. A. was a member of two separate firms; he made a note in the name and for the business of one of them; when the note became due he paid it with a cheque of the other firm. There being nothing more in the case than the actual fraud and the notorious insolvency of A., the transaction was upheld. "All this may be proper and right, for it may result from an understanding of these firms, the person giving the note and cheque being a member of each. The banker could not know anything to the contrary." I do not pursue the inquiry whether this would be followed in our Courts, as it is not necessary, I think, to go so far.

Another way of looking at the transaction attacked in this action is that the bank participated in the alleged unauthorised, and therefore improper, act of Chandler and McRae—these, it is alleged, were guilty of a breach of trust in their dealings with the cheque.

Admitting that the deposit of the funds of the one firm to the credit of the other should, under the evidence or want of evidence

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in this case, be held to be a wrongful act—that, neither McRae nor Chandler giving any explanation why the funds were placed to the credit of the new firm, it should be taken that the transaction was a fraud upon their partner and a breach of the duty which they owed him—that is not enough to charge the bank. It is not the participation in an act which is in fact unauthorised or a breach of trust which will charge the participator, but the participation in an act which is or should be known to be so.

I do not see that the other cases cited carry the doctrine any further.

Then it is contended that the bank are liable in trover, notwithstanding my finding of good faith on their part—and, of course, in an action in trover the question of good faith is immaterial. It seems to me that, having held that the bank had a right to the cheque after discounting it, as against everybody, including the plaintiff, no question of conversion can arise.

It may not be quite useless to consider the authorities cited.

In the well-known case of *Fine Art Society v. Union Bank of London* (1886), 17 Q.B.D. 705, it was the duty of the secretary of the plaintiffs to pay all moneys of the plaintiffs into their bank to their credit. A certain post office order for the plaintiffs was handed by the secretary to the bank to be applied to his own account; the plaintiffs brought their action for conversion. It was held that when the bank clerk took the post office order from the secretary, with the direction to receive the money for it and to carry the money to the credit of his account, the bank converted it. For, “to use the language of Lord Ellenborough in *Mc Combie v. Davies* (1805), 6 East 538, at p. 540, ‘a man is guilty of conversion who takes any property by assignment from another who has no authority to dispose of it . . .’ It is said, indeed, that . . . Mugford (the secretary) had authority to dispose of the post office orders by handing them over to this very bank. But the answer is that his authority was only to hand them to the bank with directions to receive the money on account of the plaintiffs, and that consequently the act of Mugford in handing them to the bank with the directions which he gave was an act as wholly unauthorised as if he had no authority whatever to dispose of them.” This, however, was the case of an order for money, not a negotiable instrument—the rules in respect to such a document

are in no way different from those in respect of the ordinary kinds of chattel—and it was admitted that, had the document been a negotiable instrument, the result would have been different. And the same was the case in respect of the alleged conversion of money received from the post office.

In *McEntire v. Potter* (1889), 22 Q.B.D. 438, the document was an insurance policy.

In *Arnold v. Cheque Bank* (1876), 1 C.P.D. 578, while the document was a draft on S. P. & Co., it had been handed to the defendants by a person having no authority to so deal with it, having received it from the thief. There being no power at all in the person so delivering the draft, the use of it by the defendants in the manner in which it was used was a conversion. And, as there had been a conversion of the draft, the plaintiff could (as he did) waive the tort and sue for the proceeds of the draft as money received to his use.

So also in *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L.J.N.S. C.P. 713, the document indeed was a cheque, but it had been stolen.

In *Macbeth v. North and South Wales Bank*, [1908] 1 K.B. 13, the indorsement on the cheque was forged.

Since then the cheque came into the possession of the bank under the circumstances I have found, I do not think trover lies.

I think the action should be dismissed, and with costs.

The plaintiff appealed to a Divisional Court, and his appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 30th September and 1st October, 1908.

Shepley, K.C., for the plaintiff.

Bicknell, K.C., for the defendants.

January 11, 1909. MEREDITH, C.J.:—The action is brought to compel the respondents the Imperial Bank of Canada to pay into Court to the credit of a partnership firm consisting of the appellant and the respondents McRae and Chandler, to which I shall afterwards refer as the old firm, or to a receiver to be appointed by the Court on behalf of the old firm, \$56,251.27, being the amount of a cheque dated the 8th March, 1907, drawn by the St. Maurice Construction Company on the Bank of Montreal, and payable to the

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order of the old firm, which, as the appellant alleges, was converted to their own use by the bank.

The facts, as to which there is practically no dispute, are fully set out in the opinion of the trial Judge, and the only question for decision is whether or not, upon that state of facts, the defendants the Imperial Bank, by their dealings with the cheque, were, as against the old firm, guilty of a conversion of it, or parties to a breach of trust of which the respondents McRae and Chandler, as it is contended, were guilty, in applying property of the old firm to the use of a firm of McRae, Chandler, & McNeil, which I shall call the new firm, of which the appellant was not a member and in which he was not interested.

That the respondents McRae and Chandler were entitled to obtain payment of the cheque and to indorse it in the name of the old firm is not open to question, and indeed, according to the testimony of the appellant himself, that was what he expected and intended them to do.

It seems equally clear that Mr. Hay, the assistant general manager of the bank, with whom the transaction took place, had notice of the intended and of the actual application by McRae and Chandler of the proceeds of the cheque, so far as the depositing of them to the credit of the new firm was an application of them, for that they should be so deposited was the object of the transaction in which the parties were engaged.

The indorsement of the cheque and the receipt by McRae and Chandler of the proceeds of it being, as I have said, acts within their authority, it follows that the acts of the bank in presenting the cheque for and receiving payment of it and paying over the proceeds to McRae and Chandler cannot render the bank liable to the old firm for the conversion of the cheque or for the payment to it of the proceeds.

It was, however, contended that in placing the proceeds of the cheque to the credit of the new firm, McRae and Chandler were guilty of a breach of trust, and that the bank were parties to the breach of trust, and are liable, with McRae and Chandler, to answer for it to the old firm.

Assuming this contention to be well founded, it is manifest that the relief the appellant would be entitled to is not that the whole proceeds of the cheque should be paid into Court, but only so

much of them as have not been applied for the purposes of the old firm; and that part at least of the proceeds have been applied in that way was conceded on the argument.

I am, however, of the opinion that the contention is not well founded.

The case must, in my opinion, be treated just as if, after the proceeds of the cheque had been received by the agents of the old firm, for the bank were its agents to receive payment of the cheque, they had been handed to McRae and Chandler, and afterwards deposited by them to the credit of the new firm.

Unless the proposition can be maintained that a banker who has money belonging to a partnership firm would be justified in refusing to honour a cheque properly drawn upon him by the firm because he knew that the partners who presented it for payment intended to deposit the money when received to the credit of a partnership firm bearing another name, of which those partners were members, and did not know that another partner in the firm which were his customers was a member of that other firm, I can see no ground upon which the bank can be fixed with liability for having concurred in a breach of trust committed by the respondents McRae and Chandler.

That proposition cannot, in my opinion, be maintained. To hold that such a duty as must be implied from it rests upon a banker would be to hold what, so far as I have been able to ascertain, has never been decided, would interfere seriously with banking business, and would not be in accordance with the law.

To so hold would mean that a debtor to a partnership may not pay his indebtedness to one of the partners if aware that he intends to use the money for the purposes of another firm in which he is and another partner is not a member, without being liable for a breach of trust if the money is so used; and that such a liability would arise could not be seriously argued.

There was, moreover, no evidence whatever of any fraudulent intent on the part of McRae and Chandler in dealing with the cheque as it was dealt with by them, and there was nothing to shew that in the result any part of the proceeds of it was applied for purposes other than those of the old firm.

It may be that in depositing the proceeds of the cheque to the credit of the new firm, a technical breach of trust was committed

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by McRae and Chandler, but, whether or not a breach of trust, technical or otherwise, was committed, the bank are not, in my opinion, chargeable with being parties to it.

In the view I have taken as to the real nature of the transaction between the parties, it is unnecessary to refer to the cases cited by the learned counsel for the appellant, or to the provisions of the Bills of Exchange Act to which he referred.

In my opinion, the appeal should be dismissed with costs.

From this judgment the plaintiff appealed to the Court of Appeal, and his appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 23rd and 24th September, 1909.

Shepley, K.C., for the appellant. The collection of the cheque from the drawee bank by the respondent bank was in effect a purchase of the cheque by the latter from the respondents McRae and Chandler, and, as the respondent bank bought the cheque with notice of the infirmity of the title of the vendors, they must account for the proceeds to the true owners. The respondent bank made the collection as principals on their own behalf. The question to be determined is one of property, and good or bad faith cannot affect it. Independently of fraud or negligence, the plaintiff is entitled to succeed. I rely upon the following cases, most of which were cited before the Divisional Court, though they considered it unnecessary to refer to them: *Arnold v. Cheque Bank*, 1 C.P.D. 578; *Patent Safety Gun Cotton Co. v. Wilson*, 49 L.J.N.S.C.P. 713; *Fine Art Society v. Union Bank of London*, 17 Q.B.D. 705; *McEntire v. Potter*, 22 Q.B.D. 438; *Macbeth v. North and South Wales Bank*, [1908] 1 K.B. 13; *Great Western R.W. Co. v. London and County Banking Co.*, [1901] A.C. 414; *Gordon v. London City and Midland Bank*, [1902] 1 K.B. 242; *Capital and Counties Bank v. Gordon*, [1903] A.C. 240; *Bavins Junr. & Sims v. London and South Western Bank*, [1900] 1 Q.B. 270; *Ex p. Darlington District Joint Stock Banking Co.*, 4 D.J. & S. 581; *Heilbut v. Nevill* (1870), L.R. 5 C.P. 478; *Hannan's Lake View Central (Limited) v. Armstrong and Co.* (1900), 16 Times L.R. 236.

Bicknell, K.C., for the respondents the Imperial Bank. The respondent bank became the holders of the cheque in due course and were entitled to receive the proceeds: R.S.C. 1906,

ch. 119, secs. 3, 56, 63, 132; *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, 212. The authorities cited by the appellant, with few exceptions, deal with circumstances which are not in question in this case, such as forged indorsements, or the assignment of stolen or non-negotiable instruments, to which different principles apply. The business of banking could not go on if the appellant's contention were well founded. It would also subvert the principles of the law of partnership, since it is in substance contended that no partner in a firm has authority to deal with the firm's money. The bank were not bound to inquire into the state of the partnership accounts between the parties to whom the cheque was payable: *Bank of New South Wales v. Goulburn Valley Butter Co.*, [1902] A.C. 543. Even if negligence on the part of the bank were proved, that would not be sufficient unless bad faith were also proved, as to the absence of which we have the judgment of two Courts. As to the power of individual partners to bind the firm I refer to *Lewis v. Reilly* (1841), 1 Q.B. 349, and *King v. Smith* (1829), 4 C. & P. 108. The *Darlington* case relied on by the appellant is distinguishable, as has been correctly found by the trial Judge. I also refer to secs. 95 and 96 of the Bank Act, which relieve the bank from seeing to the execution of any trusts to which deposits may be subject. See *Union Investment Co. v. Wells* (1908), 39 S.C.R. 625, and *Peters v. Perras* (1909), 42 S.C.R. 244, which decide that the doctrine of constructive notice does not apply to bills and notes transferred for value.

F. R. MacKelcan, on the same side, referred to the judgment of Lord Herschell in the *Simmons* case, *supra*, at p. 222, from which it appears that the highest ground which the appellant could take was that there was a duty on the bank to make inquiry, and if inquiry had been made in the present case it is quite plain that the respondents *McRae* and *Chandler* would have said that they had the right to deal with the cheque as they did.

H. E. Rose, K.C., for the respondents *McRae* and *Chandler*, contended that no claim for relief had been made against his clients, who, however, repudiated any admission on their part that they had dealt wrongfully with the appellant's money.

Shepley, in reply, contended that the respondents had failed to distinguish the present case from the *Darlington* case, which was precisely in point. As to "impeaching the good faith" of the

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bank, that is a mere question of terminology, and it is not necessary to use abusive language in order to assert that the bank had notice of the infirmity of the title to the cheque and must be responsible for the consequences.

October 30. MACLAREN, J.A.:—This action was brought to compel the Imperial Bank to pay into Court to the credit of a firm of Ross, McRae, & Chandler the sum of \$56,251.27, being the proceeds of a cheque in its favour which had been placed by the Imperial Bank to the credit of a new firm of McRae, Chandler, & McNeil, of which the plaintiff was not a member.

The action was dismissed by the trial Judge, and his judgment was affirmed by the Divisional Court.

The main facts are few and simple and are not really in dispute. The cheque was in payment of work done by Ross, McRae, & Chandler as contractors for the construction of a railway in the Province of Quebec. The plaintiff had not been attending personally to this contract, and says he expected his partners McRae and Chandler, when they received this cheque, to pay the accounts due by the firm and give him his share of the profits. Chandler indorsed the cheque in the name of the firm, adding his own signature. He then indorsed it in the name of the new firm, again adding his own signature, and gave it to the Imperial Bank with instructions to place the proceeds to the credit of the new firm in the account which he had arranged to open with them. The bank immediately placed the full amount of the cheque to the credit of the new firm and forwarded it for collection to the Bank of Montreal at Montreal, on which it was drawn.

The plaintiff does not question the right of Chandler to indorse the cheque.

The trial Judge found that there was no negligence on the part of the Imperial Bank, and that "no possible imputation of fraud or unfair dealing, wilful blindness, or any impropriety, can successfully be made against Hay" (the manager of the bank, with whom the arrangement was made), "whose good faith in this transaction is above suspicion."

It was strongly urged before us on behalf of the plaintiff that, altogether independently of any fraud or negligence, he was entitled to succeed in this action on the principle laid down in *Capital and Counties Bank v. Gordon*, [1903] A.C. 240.

I find myself quite unable to accede to this proposition. So far as that case has any bearing upon the present, I think it tells against the plaintiff instead of in his favour. It shews that the bank in the present case became the holders of the cheque for value as soon as they placed the amount to the credit of McRae, Chandler, & McNeil, and that they collected the money from the Bank of Montreal on their own account and not as agents for that firm.

The *Gordon* case was one of crossed cheques which bore a forged indorsement, and it decided that where a banker credited a customer with such cheques when they were handed in he did not afterwards receive payment for the customer but for himself, and was not entitled to the protection of sec. 82 of the Imperial Act. This was before the passing of the Imperial Amending Act of 1906, which was passed to relieve a banker acting in such a case in good faith and without negligence. As our Parliament has not amended sec. 175 of our Act, which is identical with the original section of the Imperial Act, no doubt that decision would have been binding and conclusive in this case if the facts and circumstances had been the same.

It was also urged upon us that the plaintiff was entitled to succeed on the ground that the Imperial Bank did not become holders in due course of the cheque in question. The facts shew, however, that all the requirements of sec. 56 of our Bills of Exchange Act were fully complied with. The cheque was complete and regular on its face, was not overdue, had not been dishonoured; the bank took it in good faith and for value, and when it was negotiated the bank had no notice of any defect in the title of the person who negotiated it.

It was conceded before us that Chandler had a perfect right to indorse the cheque for the firm of Ross, McRae, & Chandler. It thereupon became payable to bearer, and, when handed over to the bank and placed to the credit of the new firm, the bank became the holders for value: *Ex p. Richdale* (1882), 19 Ch.D. 409; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715; *Capital and Counties Bank v. Gordon*, *supra*, at p. 245.

There was nothing suspicious in the circumstances that a Montreal cheque in favour of persons who all lived in or near Toronto, and were known to be of good business standing, should be deposited in a bank in Toronto instead of in a bank at a point in the Province

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of Quebec 500 miles distant, where they had had a contract, which, however, was completed and was being settled up, even if these facts had been known to Mr. Hay, as some of them were. It was admitted in the argument on behalf of the plaintiff that Chandler had full authority to indorse and receive the amount of the cheque from the bank upon which it was drawn, or to indorse and deposit it in the bank of the firm, and then to withdraw the proceeds by cheque. If such a cheque had been drawn in favour of the new firm, it was not suggested that it would have been a suspicious circumstance or that the Imperial Bank might not become the holders in due course.

It would not have been sufficient in this case that the Imperial Bank were guilty of negligence in dealing with the cheque as they did to enable the plaintiff to recover. It would be necessary for him to go farther and to prove bad faith. The trial Judge, who saw and heard the witnesses, found that the good faith of Hay, the manager of the bank, was not only above suspicion, but that there was not any negligence. A careful reading of the evidence makes the same impression on my own mind. There appears to be nothing to suggest that Mr. Hay had any suspicion that anything was wrong or that he refrained on that account from asking questions or making further inquiry.

In my opinion, the appeal should be dismissed.

MEREDITH, J.A.:—When the cheque was acquired by the Imperial Bank it was apparently the property of the McRae firm, and had ceased to be the property of the Ross firm: for, although it was payable to the order of the Ross firm, it had been indorsed by them, and, under that indorsement, indorsed by the McRae firm: and was presented to the bank as the property of the latter firm. It cannot be denied that the indorsement of the Ross firm was a valid indorsement, so far as any one acquiring the instrument in good faith without notice of any impropriety in the indorsement of the instrument, or intended impropriety in dealing with its proceeds, was concerned.

That which the bank did was merely to acquire a negotiable instrument, which was, as to a transferee in good faith, validly indorsed; and to pay the price to those who were, as to them, the lawful holders.

In these circumstances, how can the plaintiff have a right of

action against the bank, unless they had some notice, or knowledge, of the misconduct of those who actually transferred the instrument to them?

It cannot be seriously urged that the bank had any notice, or knowledge, of any impropriety in the transaction so as to deprive them of shelter under the ostensible character of it.

If the bank had any sort of notice, or knowledge, that the McRae firm were not actually, as well as ostensibly, the lawful holders of the cheque, a different case would be presented.

Having regard to the great number, and multifarious character, of banking transactions, and the diverse character of the businesses and schemes of bankers' customers, I find it impossible to say that the bank had, through any of its officers, any notice, or knowledge, of the misapplication of the cheque.

The *Darlington* case was determined upon its particular facts; every case must be so determined. Under even apparently very similar circumstances, the very truth, upon a question of fact, may be very different in one case from another. The circumstances of the *Darlington* case were, however, in some respects, quite different from those of this case: indeed it is no difficult task for any one to reach the conclusion that in each the truth, upon the important question of fact, was reached.

I would dismiss the appeal.

OSLER, J.A.:—I agree in the result, though not, I must say, without doubt. The transaction may appear in the result to have been safe, but I take the liberty of saying that it does not look like sound banking business, considering the risk that was incurred of its being successfully impeached. The case is reduced to the single point—a question of fact—did the bank acquire the cheque in good faith—for they were purchasers, not agents for its collection—from the defendant Chandler by his indorsement of it in the name of his firm? That has been found in their favour by the trial Judge, and on the whole perhaps it should be said—and this is where my doubt arises—that it cannot clearly be inferred from the evidence that such a finding is wrong.

MOSS, C.J.O., and GARROW, J.A., agreed in the result.

Appeal dismissed with costs.

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Nov. 5.

Parties—Band of Indians—Representation of Class—Con. Rule 200—Order of Local Judge—Jurisdiction—Con. Rules 47,368—Petition to Set aside Proceedings—Practice—Motives of Petitioners—Status.

In an action against a Band of Indians collectively and against five individual members of the Band, to recover moneys alleged to be due to the plaintiff for professional services rendered to the Band, an order was made by a local Judge, on the application of the plaintiff, and on the consent of a solicitor instructed by a resolution passed at a meeting of the Band, that the five individual defendants should defend on behalf of the Band for the benefit of all members of the Band, and that all members of the Band should be bound by any judgment that might be pronounced in the action, etc. Upon this order were founded a judgment for the plaintiff and an order appointing a receiver to receive all moneys due to the defendants from the Dominion Government, to be applied upon the judgment:—

Upon the petition of six members of the Band, on behalf of themselves and all other members, the Superintendent General of Indian Affairs and the Minister of Justice also joining as petitioners, to set aside the proceedings before the local Judge so far as they affected the rights of the Band or its members other than the individual defendants:—

Held, that the six petitioning members had the right, as representing the class to which they belonged, the members of the Band, to petition or move against the proceedings, and it was immaterial what their motives, or those of the other petitioners, in so petitioning, were, nor was it important whether they came before the Court by way of petition, appeal, or otherwise.

An order for representation can only be made by the Court: Con. Rule 200; a local Judge is not the Court, and has no power to make such an order. Con. Rule 368 applies only to business properly brought before a Judge in Chambers; and Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county; here the solicitors for all those who were formally parties did reside in the county; but, before an order can be made by a local Judge binding those not formally before the Court, they must either agree that the motion be heard by him or have a solicitor residing within the county.

Order for representation and all orders and judgments based thereon set aside except so far as they affected the individual defendants.

PETITION to set aside a judgment and other proceedings in this action. The facts are stated in the opinion.

The petition was heard by RIDDELL, J., in the Weekly Court at Toronto, on the 4th November, 1909.

W. E. Middleton, K.C., and *H. S. White*, for the petitioners.

R. V. Sinclair, K.C., and *H. E. Rose*, K.C., for the plaintiff.

November 5. RIDDELL, J.:—The plaintiff, a solicitor, sets up that he was employed by the Mississaguas of the Credit, a band of Indians, to press a claim in respect of certain moneys to which it was asserted they were entitled in the hands of the Crown at Ottawa.

He took proceedings in the Exchequer Court of Canada, and was successful in obtaining a decree for a large sum. The proceedings are reported in *Henry v. The King* (1905), 9 Ex.C.R. 417.

The solicitor claimed for his services a considerable sum, which was not paid. He thereupon brought an action on the 3rd March, 1909, against Herkimer, Sault, Laforme, McDougall, and Tobicoe, "Chief Councillor and Councillors of the Mississaguas of the Credit, on behalf of themselves, as well as all other members of said Mississaguas, and the said Mississaguas of the Credit," as defendants.

On the 5th March, 1909, a meeting of the Band was held to consider the question of their indebtedness to the plaintiff; and that meeting—a small number of the Band being there present—passed a resolution stating that they wished their council to deal with the matter and were willing to abide by their decision; the council met and decided to call a public meeting of the electors of the Band to consider the matter. On the 14th May, 1909, this meeting was held—a small number again being present—and decided to give instructions to Mr. McEvoy to represent them and the Mississagua Band in the action and to consent to judgment for the amount sued for, also to consent to the appointment of a receiver and to a restraining order, "provided that said judgment is only to be paid out of the funds of the Mississaguas of the Credit at Ottawa . . . and is not to be binding in any way against the property of said . . . Band on their reserve, or of any member of the Band on the reserve"

Mr. McEvoy received authority accordingly "to act for them in the above matters and endeavour to carry out the terms of the above resolution on their behalf." Armed with this, he appeared with the plaintiff before His Honour Judge Elliott at London on the 12th June, 1909. That local Judge first made an order, "It appearing that the class being numerous and the five individual defendants are members of said Mississaguas of the Credit . . . that the said" five persons "do defend on behalf of said Mississaguas of the Credit for the benefit of all members of said Mississaguas of the Credit, and that all the members of said Mississaguas of the Credit shall be bound by any judgment that may be pronounced in this action in the same manner and to the same extent as if they were personally made parties to this action."

On the same day, no appearance having been entered, an order

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was made by the same local Judge, reciting the order just mentioned, and that the five defendants named appeared by their counsel and had submitted the rights of their co-defendants, the other members of the Band, and of the Band, to the Court, and submitted, as well on their own behalf as on behalf of all other members of said Mississaguas of the Credit, and said Mississaguas of the Credit, to such order as might be made herein, and then ordering that the plaintiff be at liberty to enter final judgment against the defendants for the sum of \$10,700.47 and interest . . . and that said judgment should be binding upon "the whole of the members of the Mississaguas of the Credit in the same manner and to the same extent as if they were personally made parties to this action." It will be noticed that the judgment is not declared to be binding upon "the Mississaguas of the Credit." Upon this order a judgment was entered on the 15th June, 1909: "It is this day adjudged that the plaintiff recover against the said defendants \$10,824.01 to be paid to the plaintiff."

On the 29th June, 1909, an order was made by the same local Judge appointing the plaintiff receiver to receive all moneys due the defendants from the Government, to be applied on the plaintiff's judgment, and restraining the defendants, either by themselves or by their agent Van Loon, or other agent, from receiving it until the plaintiff's judgment was paid. On the 2nd July an order was made appointing the local Master at Ottawa receiver in the room and stead of the plaintiff, but not otherwise varying the previous receiving order.

The Band is composed of some 267 persons, men, women, and children.

Now come six members of the Band, and also the Superintendent-General of Indian Affairs and the Minister of Justice, by petition to the Court, and ask, amongst other things, that it may be declared that the proceedings before the local Judge were and are null and void in so far as they purport to affect the rights of the tribe or the members of the said tribe other than the individual defendants, and that they be set aside and vacated. The six petitioners come to Court asking relief "on behalf of themselves and all other members of the Mississaguas of the Credit;" the Superintendent-General of Indian Affairs and the Attorney-General and Minister of Justice

for Canada join in the petition; they, the six first named petitioners, being themselves members of the Band.

Upon the matter being opened before me in Weekly Court, I offered an issue to be tried upon all the points in controversy—this was declined: I therefore proceed to dispose of the case on the material before me.

I take it for granted that the plaintiff has an honest claim to quite the amount of his judgment, and that he has acted in good faith throughout.

I do not think that anything turns upon how the petition came to be lodged; apparently it was at the instance of the authorities in Ottawa. The petitioners are before the Court—the matter is before the Court. “It is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court . . . must decide according to law . . . whatever be the motives and wishes of the respective litigants:” Lord Halsbury, L.C., in *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143, at p. 157; *Freeman v. Canadian Guardian Life Insurance Co.* (1908), 17 O.L.R. 296, 299; *Township of Bucke v. New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123.

The petitioners may petition or move as representing the class to whom they belong, *i.e.*, the members of the Mississagua Band. Whether the Superintendent-General of Indian Affairs or the Attorney-General and Minister of Justice for the Dominion can, need not be considered.

Nor do I pay any attention to the manner in which the case is brought before the Court. If the proper practice should be by appeal under Con. Rule 48 (see Con. Rule 47 (a) (b) (c)), I shall consider this such an appeal, or if in another way, then I consider it so brought, making all necessary amendments, extension of time, etc. All these niceties of practice go to costs, and I do not think this a case for costs in any event.

The order for judgment does not make the judgment binding upon the Band—and any order for receiver, etc., based upon the proposition that the Band are bound by the judgment, is, of course, irregular and cannot stand.

But the chief difficulty is as regards the judgment binding the several members of the Band. That could only be if the order for representation is valid. Such an order can only be made by the

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Court: Con. Rule 200. The local Judge is not "the Court," and has no power to make such an order: *Re Reid* (1909), 13 O.W.R. 915, 1026.

A very ingenious argument was advanced by Mr. Sinclair as follows: Con. Rule 47 (1242) gives the local Judge, in actions brought in his county, "the like powers of a Judge in the High Court, in Court or Chambers;" and Con. Rule 368 provides that "a Judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court." Therefore, it is argued, as the Court could make this order, a Judge in Chambers could do so also, and consequently so could the local Judge. But there are two weak points: (1) Con. Rule 368 applies only to business properly brought before the Judge in Chambers: *Re Reid, ubi supra*; and (2) Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county. Here the petitioners had no solicitor; and they did not consent. I do not forget that the petitioners were not formally parties to the action, and that the solicitors for all those who were formally parties did reside in the county; but I think, before an order can be made by a local Judge binding those not formally before the Court, that they must either agree that the motion be heard by him or have a solicitor residing within the county, at least.

The order for representation will be set aside and also all orders and judgments based upon this order, except so far as they affect the individual defendants.

I express no opinion upon the other questions argued: it may be well for all parties to consider whether this is not a proper case for a settlement.

The plaintiff has, I am convinced, acted in good faith throughout, and it is not a case for costs; especially is this so, as much of the relief sought could not be obtained in this summary way; but, even had the other relief not been sought, I would still, as a matter of discretion, have directed that no costs should be paid by either party.

[RIDDELL, J.]

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Nov. 2.

Contract—Advertisement—Redemption of Bonds—Specific Performance—Mortgage Trust Deed—Construction—Breach of Trust—Trustees Acting Honestly and Reasonably—62 Vict. (2) ch. 15, sec. 1 (O.)

A mining company, on the 1st June, 1905, issued bonds to the face value of \$1,000,000, secured by a mortgage trust deed, of the same date, to the defendants; and the plaintiff became the holder of \$10,000 thereof. In May, 1907, the defendants advertised for offerings of the bonds for redemption; the plaintiff offered his \$10,000 at 82; the defendants did not accept; they redeemed other bonds, some at a higher rate, but did not redeem the plaintiff's.

In an action for breach of trust by the defendants as trustees and for specific performance of an alleged contract or damages in lieu thereof, the plaintiff contended that the defendants were trustees under all the terms of the trust deed, one term being that from the bonds offered the defendants should purchase those bonds which were offered at the lowest price; that, as the advertisement referred to the trust deed, the advertisement should be taken as though the defendants were expressly promising to buy in accordance with the terms of the trust deed; that this constituted an offer by the defendants to buy upon the tender at the lowest price; that the plaintiff did so tender; and consequently the defendants were bound:—

Held, that the deed was not by implication made part of the advertisement; but, if it were, that the direction to purchase at the lowest price was not to be interpreted literally, but in a business sense; the object was to redeem as many bonds as possible at the cheapest rate—to spend the money furnished by the mining company in reducing as much as possible their bonded indebtedness; and the method pursued by the defendants, having regard to the offerings made, was unexceptionable from a business point of view, and was not a violation of the terms of the trust deed.

Held, also, that the defendants had, in the premises, acted honestly and reasonably, and ought fairly to be excused for the breach of trust, if there was one: 62 Vict. (2) ch. 15, sec. 1 (O.)

THE Dominion Copper Co. Limited, a mining company operating in British Columbia, issued on the 1st June, 1905, bonds to the face value of \$1,000,000 in denominations of \$100, \$500, and \$1,000. These were secured by a mortgage to the defendants of the same date; and the plaintiff became the holder of \$10,000 thereof. In May, 1907, the defendants advertised for offerings of such bonds for redemption: and the plaintiff offered his \$10,000 at 82: the defendants did not accept; they redeemed other bonds but not those of the plaintiff.

On the 6th November, 1908, the plaintiff sued, claiming in the first instance breach of trust by the defendants as trustees, and, by an amendment, specific performance of the contract which he said had been made, or damages in lieu thereof.

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The action was tried before RIDDELL, J., without a jury at Toronto, on the 22nd and 29th October, 1909.

J. H. Moss, K.C., and *C. A. Moss*, for the plaintiff.

A. W. Anglin, K.C., and *R. C. H. Cassels*, for the defendants.

November 2. RIDDELL, J.:—No charge of collusion, fraud, or other wilful impropriety is made against the defendants, nor could any such be made: but it is contended that they have misinterpreted their deed of trust, and are liable as for a breach of their trust.

The document, dated the 1st June, 1905, is made between the Dominion Copper Co. Limited, as mortgagors, and the defendants, as trustees; it recites a resolution to borrow \$1,000,000, and for that purpose to issue first mortgage 6 per cent. gold bonds, payable on the 1st June, 1915, bearing interest at six per cent., payable semi-annually, and sets out the form of bond—a delivery bond, but which might be registered. (In fact only four bonds of \$100 each were ever registered.) The deed goes on:—

“Now therefore this indenture witnesseth that the Dominion Copper Company Limited, in consideration of the premises and of one dollar to it in hand paid by the trustee at the time of the execution and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds aforesaid to be issued as herein provided, and every part of said principal and interest as the same shall become payable according to the tenor of said bonds and the coupons thereto attached, and in order to insure the faithful performance of the covenants and agreements hereinafter set forth, and in order to declare the terms and conditions upon which said bonds are issued, received, and to be held, has executed and delivered these presents and has granted, bargained, sold, transferred, assigned, conveyed, and set over, and by these presents does grant, bargain, sell, transfer, assign, convey, and set over, unto the National Trust Company, as trustee, its successors and assigns forever, all its present and after-acquired real and personal property, assets, and effects, including among others:” (setting out the property).

Then the trust is declared:—

“But in trust, nevertheless, for the equal *pro rata* use, benefit, and security of all and every the persons, firms, or corporations which shall become or be the owners or lawful holders of any of the

said bonds issued or to be issued under and secured by this indenture, and of all coupons pertaining thereto, without preference, priority, or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue, sale, or negotiation thereof, or otherwise, so that each and every bond issued as aforesaid shall have the same right, lien, and privilege under and by virtue of this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been duly issued, sold, and negotiated simultaneously with the execution and delivery of this indenture."

Then comes a very voluminous enumeration of the terms on which the bonds are issued, that upon which the plaintiff relies being art. 2, sec. 12:—

"Section 12. The mortgagor company will on the first day of June, 1906, and the first day of June, 1907, pay to the trustee all of its surplus profits for such years after all payments and reservations for betterments, improvements, and extensions have been deducted, up to but not exceeding ten per cent. of the aggregate amount of bonds outstanding on the first day of April immediately preceding the first day of June on which the particular payment is to be made. In case, however, the surplus profits of the mortgagor company on the first day of June, 1906, shall not be equal to ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1906, but the surplus profits of the mortgagor company on the first day of June, 1907, shall exceed ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1907, then and in that event the mortgagor company will pay to the trustee on said first day of June, 1907, an amount equal not only to ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1907, but also such an amount as shall be equal to the difference between the amount of the payment made by it to the trustee on the first day of June, 1906, and an amount equal to ten per cent. of the aggregate amount of bonds outstanding on the first day of April, 1906.

"The trustee shall be under no duties or responsibilities as to the payment over of such surplus profits by the mortgagor company, and the trustee may rely entirely upon the certificate or certificates of any officer of the mortgagor company as to such surplus profits.

"The mortgagor company will, on the first day of June, 1908,

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and on the first day of June in every succeeding year up to and including the first day of June, 1914, pay to the trustee an amount equal to ten per cent. of the aggregate amount of bonds outstanding on the first day of April immediately preceding the first day of June on which the particular payment is to be made. Nothing herein contained, however, shall be construed to prevent the mortgagor company from paying nor the trustee from receiving the payment herein provided for before the first day of June in any year.

"The moneys so paid to the trustee shall be applied to the retirement of bonds of the company issued hereunder and secured hereby and for that purpose only, to be obtained as follows:—

"(1) During the period extending from the first day of June, 1906, to the first day of June, 1914, both inclusive, the trustee shall annually, or oftener, at such times as it shall deem advisable in the exercise of an absolute discretion, by a notice published once a week for two consecutive weeks in a newspaper in general circulation in the city of New York, and in a newspaper in general circulation in the city of Toronto, call for offerings of the bonds issued under and secured hereby, to be made within some period prescribed in said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not, however, exceeding the par value of said bonds and the then accrued interest for each such bond."

As the sub-sec. 2, which immediately follows, may require to be considered, I add it here together with the conclusion of sec. 12:—

"(2). If, during the prescribed period, sufficient bonds are not offered to exhaust said fund at less than par, then and in that event said trustee shall, by a notice published once a week for two successive weeks in a newspaper of general circulation published in the city of New York, and in a newspaper of general circulation in the city of Toronto, give notice that certain bonds, specifying the same by their numbers to be drawn by lot as below mentioned, are called for the purpose of investing therein the moneys paid to the trustee by the mortgagor company. If any outstanding bonds are registered, then a copy of such notice shall also be sent to the post office address of the holder or holders in whose name or names such bonds are registered. Such bonds so to be called shall be chosen by lot by the trustee. The bonds having been so called shall become due and payable at the office of the trustee upon a date specified in the

call, which date shall not be less than thirty days after the publication of said notice, at par of said bonds, and the interest then accrued thereon for each such bond.

"The bonds of the company which shall be acquired under the above provisions shall, as soon as received by the trustee, be cancelled."

The defendants had acted as agents for the mining company in the sale of stock, bonds, etc., and had in May, 1907, a large sum of money belonging to the company in their hands: the mining company had surplus earnings to a net amount of over \$180,000 available to hand over for the redemption of bonds; and it was arranged that, to save cost, etc., of transmitting money to and from the companies, the defendants should use, of the moneys in their hands belonging to the mining company, sufficient, with a small remittance from the mining company, to make up a sum of \$170,000 to apply in redemption of bonds.

An advertisement was on the 2nd May, 1907, made by the defendants in the following form:—

"The Dominion Copper Company Limited. (No personal liability).

"First mortgage six per cent. gold bonds.

"The Dominion Copper Company Limited, in accordance with the requirements of its mortgage, dated June 1st, 1905, securing the above issue, has paid out of its earnings the sum of one hundred and seventy thousand dollars (\$170,000) to the National Trust Company Limited trustees under the mortgage, to be applied in the redemption of bonds, as provided by the mortgage. Offerings of the bonds for sale as of June 1st, 1907, exclusive of the interest coupon maturing on that date, stating the amount offered and price for delivery at the office of the undersigned, at Toronto, Ontario, will be received by the undersigned up to and inclusive of May 25th, 1907.

"National Trust Company Limited,

"18-22 King St. East,

"Toronto, Canada."

A circular in similar terms was sent to all the bondholders who were known to the defendants.

On the 10th May, 1907, the plaintiff wrote to the defendants

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from New York: "Your circular letter, in reference to the Dominion Copper Company Limited first mortgage six per cent. gold bonds, duly received. I hereby offer you ten thousand of these bonds at eighty-two (82). L. E. Whicher."

Many tenders or offerings were received from others, some below and some above the figure of the plaintiff. The total amount of the offerings below par was \$363,300, at prices aggregating \$309,785.70. Of these, however, one tender by Untermeyer was \$190,700 at \$170,000, *i.e.*, at a rate of about 87. Exclusive of these bonds it will be seen that there were \$167,600 offered at \$139,785.70. If all the offered bonds (excluding Untermeyer's) were taken up, the result would be that $\$170,000 - \$139,785.70 = \$30,214.30$ would remain unused in the hands of the defendants. Mr. White, the manager of the defendants, thought it the duty of the defendants to expend all, or as nearly as possible all, of the \$170,000 in redeeming bonds, and accordingly telegraphed Untermeyer asking if he would accept the figure named for part of his bonds; Untermeyer answered that he was anxious to do the best possible for the company, and would entertain proposal for selling balance if the defendants had offers for small amounts on better terms. The defendants answered (27th May) that they had tenders for \$142,000 bonds for \$115,742.70, and asked if Untermeyer would sell \$62,400 bonds for balance of sinking fund. Untermeyer suggested that the defendants should take \$50,000 to \$60,000 lowest tenders, and he would furnish sufficient at the figure named to redeem \$200,000 for \$170,000. This was not satisfactory to the defendants. Mr. White was then under the impression that the amount of bonds could be made up by drawing at par under the provisions of 12 (2); and he concluded that it would be better financially to buy all but Untermeyer's at the rate at which they were offered by the various offerers and pay for the remainder at par, than to accept Untermeyer's proposal. He accordingly telegraphed Untermeyer that unless he were willing to sell \$62,400 bonds at the rate mentioned in his letter, the defendants must reject Untermeyer's tender. White, however, after careful study of the terms of sec. 12 (2), came to the conclusion that the defendants had no such power of drawing, and accordingly telegraphed Untermeyer that the defendants thought they ought to accept his original tender. Being anxious to redeem all that were offered under 80, *viz.*, \$39,400, the

defendants telegraphed asking if Untermeyer was willing for the defendants to accept \$39,400 from other tenderers at about 79, and to purchase the remainder from Untermeyer to exhaust the sinking fund. This was acceded to. The plaintiff's tender was declined by letter of the 28th May; Untermeyer furnished \$160,600 bonds for \$139,062.25. The bonds redeemed were \$200,000, and the fund was exhausted.

A slump took place in copper, and the mining company lost heavily and is now in liquidation.

The plaintiff's claim in contract is put forward thus: The defendants are trustees under all the terms of the trust deed: one of these is that they "from the bonds offered . . . shall purchase those bonds which are offered . . . at the lowest price;" the advertisement and circular referred to the trust deed, and consequently the advertisement and circular should be taken as though the defendants were expressly promising to buy in accordance with the terms of the trust deed, *i.e.*, the bonds which were offered at the lowest price; that this constituted an offer by the defendants to buy upon the tender at the lowest price; that the plaintiff did so tender; and consequently the defendants are bound.

Such cases as *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, *Johnston v. Boyes*, [1899] 2 Ch. 73, *Maskelyne v. Stollery* (1899), 16 Times L.R. 97, *Warlow v. Harrison* (1858), 1 E. & E. 295, 317, are cited in support.

No doubt, if this advertisement were to be read as saying, "We ask offerings of bonds and will buy the bonds which are offered at the lowest price," then, if the offerings of the plaintiff were at the lowest price, the very offering might be considered an acceptance by the plaintiff of a contract offered to him by the defendants: see *per* Lindley, L.J., in [1893] 1 Q.B. at pp. 262, 263. But there is no such statement made in the advertisement. It is sought to import into the advertisement the terms of the trust deed. Although *Rooke v. Dawson*, [1895] 1 Ch. 480, is not conclusive against this view, as there the deed was not mentioned in the advertisement (see p. 486), I do not think that the deed is by implication made part of the advertisement.

But, if it were, the direction to purchase at the lowest price cannot mean precisely what the literal meaning of the words is. In the present instance there is an offer of 1,000 at 75; one of 1,000 at 76; one

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of 1,000 at 77; one of 7,900 at 77, etc. The bonds offered at the lowest price are those included in the offer at 75 only—it could not be contended that the purchase of the 1,000 at 75 would be a complete exercise of the powers given by the trust. The expression must in a business document receive a business interpretation—the meaning can be determined from a consideration of the object for which the power is given. The object is to redeem as many bonds as possible at the cheapest rate—to spend the money furnished by the company in reducing as much as possible the bonded indebtedness of the company. I am of the opinion that the method ultimately pursued by the defendants was unexceptionable from a business point of view, and was in no way a violation of the terms of the deed of trust.

I think the plaintiff fails in contract. If he be held entitled to recover in contract at all, I find that the market price of the bonds at the time of the breach was 75—his damages will then be \$700.

The same consideration will also prevent him from recovering as *cestui que trust*.

The defendants have, in the premises, acted honestly and reasonably, and ought fairly to be excused for the breach of trust, if there was one: 62 Vict. (2) ch. 15, sec. 1 (O.); *Stewart v. Snyder* (1900), 27 A.R. 423; *Smith v. Mason* (1901), 1 O.L.R. 594; *Henning v. Maclean* (1901-2), 2 O.L.R. 169, 4 O.L.R. 666; *Re Village of Markham and Town of Aurora* (1902), 3 O.L.R. 609; *Dover v. Denve* (1902), 3 O.L.R. 664; *King v. Matthews* (1903), 5 O.L.R. 228; *Elgin Loan and Savings Co. v. National Trust Co.* (1903-5) 7 O.L.R. 1, 10 O.L.R. 41; *Chapman v. Browne*, [1902] 1 Ch. 785, especially at p. 805.

I am also of the opinion, as at present advised, that the other provisions in the trust deed protect the defendants, but I do not consider it necessary to pass upon that question.

The action will be dismissed with costs.

[DIVISIONAL COURT.]

McCuaig v. Independent Order of Foresters.

D. C.

1909

Nov. 11.

Life Insurance—Benefit Society—Total Disability of Member through Insanity—Suspension for Non-payment of Dues—Total Disability Benefit—Failure to Comply with Rules of Society.

M. was a regular beneficiary member of the defendant society, in good standing at the end of October, 1906, when he became, by reason of insanity, totally incapacitated from doing any work or following any employment. In November, 1906, he went to an insane asylum, where he remained, his incapacity continuing, until his death on the 3rd April, 1909. His dues to the society were paid up to the end of February, 1908, but, as they were not paid after that date, he was suspended for non-payment of dues. He would have been entitled, under the constitution and laws of the Society, to a total disability benefit of \$1,000, had he or some one on his behalf applied for it when he was in good standing, but his wife did not become aware of this till shortly before the 13th January, 1909, when she applied for it, but was refused. She then brought this action for it, her husband being joined as a plaintiff suing by a next friend; he died before the action came to trial:—

Held, upon reference to the constitution and laws of the society, that the member to obtain the benefit must be in good standing at the time he applies for it; and, express provision being made for an application by some one on behalf of the member where he is mentally incapacitated, the insanity in this case did not excuse the default; and the plaintiff was not entitled to recover.

Judgment of CLUTE, J., reversed.

AN appeal by the defendants from the judgment of CLUTE, J.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The facts of this case are not involved.

Angus McCuaig was a member of the Dominion Police Force and a member of the Independent Order of Foresters—a regular beneficiary member, as appears from his certificate No. 424032 dated the 18th November, 1904. At the end of October, 1906, being a member in good standing, he became “unfit mentally and physically to perform further duty:” “totally incapacitated from doing any work or following any employment,” having first shewed symptoms in April, 1906. This incapacity continued until his death, which took place on the 3rd April, 1909, after the beginning of this action. His dues continued to be paid till those due in March, 1908—it was admitted by both parties before us that the money to pay these dues was, till December, 1907, his own, and was paid by his family till that time—thereafter the local court of which he was a member, or some of the brethren, paid till the

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end of February, 1908, for him. He had, about November, 1906, gone to the Asylum for the Insane at Brockville, where he remained until the time of his death.

On the 13th January, 1909, his wife wrote the Supreme Chief Ranger of the defendant Order, saying that her husband had been totally disabled since the summer of 1906, that, being mentally unbalanced, he failed to apply for \$1,000 to which he was entitled from the total disability fund, but continued to pay until the 1st December, 1907, and the court then carried him to the 1st February, 1908. She made application for the \$1,000, and, after speaking of the handsome way in which he had been treated by the Dominion Police authorities, she added: "We beg that the Foresters will shew him the same consideration, and will not take advantage of his insanity. It is only recently we have learned of the disability fund." The Supreme Chief Ranger answered that McCuaig had been suspended on the 1st March, 1908, for non-payment, and pointed out what she should have done if she desired her husband to be placed on the total disability list, and added: "Not having done this, and not having paid his assessments, and he having been reported from the Order for non-payment, we have no power to now reinstate him or to place him on the probationary list or pay any benefits on his account to any one." Thereupon this action was brought by the wife and by the husband acting by a next friend. It was tried before my brother Clute at Ottawa, without a jury on the 15th June, 1909. In the judgment as settled the plaintiffs recover the sum of \$1,000 and costs without prejudice to their right to bring a further action for the remaining \$1,000 by reason of the death of Angus McCuaig.

The defendants appeal.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ., on the 6th October, 1909.

Shirley Denison, for the defendants. At the time when the action was brought the right of action was vested in the Inspector of Prisons and Public Charities: R.S.O. 1897, ch. 317, sec. 48. Angus McCuaig had ceased to be a member of the defendant Order under their rules and by-laws, having been suspended and having let the time within which reinstatement was possible elapse without

applying therefor: *McKechnie v. Grand Orange Lodge of British America* (1909), 18 O.L.R. 555, especially at p. 561. McCuaig had no right to total disability benefit, because he had not been adjudged by the Order to be totally and permanently disabled.

A. E. Fripp, K.C., for the plaintiff. The Order, repudiating any liability on their part in respect of the claim sued on, disentitled themselves to rest on the inadequacy of the proof of claim at this stage: *Morrow v. Lancashire Insurance Co.* (1898), 29 O.R. 377, affirmed (1899), 26 A.R. 173; *In re Coleman's Depositories Limited*, [1907] 2 K.B. 798. Immediately on total disability, McCuaig, being in good standing at that time, had a vested right to the total disability benefit. The "adjudging" by the Order was not a condition precedent to his right. Insanity is an excuse for not giving notice: *Insurance Companies v. Boykin* (1870), 12 Wall. (U.S.) 433; *Accident Insurance Co. of North America v. Young* (1892), 20 S.C.R. 280; *Woodmen Accident Assn. v. Pratt* (1901), 62 Neb. 673.

Denison, in reply. Total and permanent disability is when the Order has so adjudged. A claimant must exhaust the right of appeal to the domestic tribunal before coming to this Court.

November 11. RIDDELL, J. (after stating the facts as above):—There are no disputed facts—the whole matter is as to the interpretation of the rules of the defendants. The Order have a two-fold object: (1) to unite its members fraternally and in benevolent works; and (2) "to give such aid and benefits to its members and those dependent upon them as may be provided in its constitution and laws"—4 (1) (2). These benefits "are provided in four departments:" (1) mortuary benefit; (2) total disability benefit; (3) sick and funeral benefit; (4) fraternal benefit—4 (3). "In the total disability benefit department provision is made (a) for the payment to a member in this department who is totally and permanently disabled by accident or disease of a sum equal to one-half of the amount of the insurance or mortuary benefit, payable in five equal annual instalments, subject to the provisions of sec. 158: or (b)"—not of importance here. The fund for this department is provided for by sec. 33 (17). By sec. 77 (3) it is provided that a regular beneficiary member is to receive a policy or benefit certificate—that was done, as we have seen, in the present case; and, sec. 80 (17), McCuaig became and was a regular beneficiary member,

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but "only so long as he complied with the provisions of the constitution and laws." One of these provisions is that the member shall pay each month a certain sum—sec. 126: and each local court must early in each month send in a report, *inter alia*, of all who have paid and the amount so paid—sec. 135 (2): and remit accordingly—sec. 136. Each of the members must pay to the financial secretary of his court, his monthly assessment or premium in advance: he has thirty days' grace, and "upon failure to pay within the said period of grace, the member shall *ipso facto* immediately stand suspended from the Order"—sec. 133 (1); and he so continues until he has been duly and regularly reinstated—sec. 134. A provision is made for reinstatement of a member suspended for non-payment of dues within ninety days of his suspension, if then in good sound mental and bodily health—sec. 140 (1) (7); or even within six months if in good sound mental and physical health—sec. 142. There is a provision which would appear to be of no small value. For each court or lodge there is commissioned a court physician—sec. 91 (1); (a) who must be a duly qualified doctor of medicine and legally entitled to practise his profession—sec. 92 (1); a graduate of some recognized medical college—sec. 111 (1). He is appointed and commissioned by the Supreme Chief Ranger upon the nomination of the court or otherwise—sec. 95 (3). Unless the court by by-law dispense with medical attendance—sec. 111 (21)—he must, free of charge (except in certain specified cases), attend, during the continuance of any illness, all the members of his court, and, generally speaking, the members of other courts taken ill within his jurisdiction—sec. 111 (10); receiving a salary of \$1 per annum per member—sec. 111 (13). If he refuse or neglect to attend, then another court physician or some other duly qualified may be engaged by the Chief Ranger or member of the sick committee and paid by the court. This sick committee is to be found in each court, and has the duty, after notice of the sickness of any member, to see to it that he is visited once each day by at least one member of the committee—sec. 113 (6). If necessary, two watchers are provided each night from among the brethren to watch the sick man: and the physician or sick committee may order a consultation of physicians and also employ competent nurses to attend the sick member—sec. 113 (9). In case of infectious or contagious diseases, the visits of the committee and the attendance of watchers are

dispensed with, and nurses may be employed. All this continues until the total disability benefit on account of accident or disease is paid—sec. 158 (14); or till death—the member remaining in good standing.

The certificate issued to McCuaig expressly provides that the constitution and laws of the Order are made a part of it. It makes McCuaig a beneficiary member “to the extent of \$2,000, less any amount which may be paid . . . on account of total and permanent disability . . .;” and, amongst other sections, expressly refers to what is now, in the revision of 1906, sec. 158. This provides: (1) Subject to the provisions of this section and of secs. 4, sub-secs. 5 and 6, 131, 132, 145, 151, and 154, every member whose policy or benefit certificate provides for the total disability benefit and who shall become totally and permanently disabled, either through accident or disease or old age, from following or directing any employment, labour, trade, occupation, business, or profession, shall become entitled to the total disability benefit” The sections referred to are not of importance in this inquiry.

It is not and cannot be disputed that McCuaig came, about October or November, 1906, literally within this section: and, had proper application been made then or shortly before his suspension for non-payment of dues, it is conceded that he would have been entitled to receive the \$1,000. But subsequent sub-sections of this sec. 158 are appealed to as shewing that, in the event which has happened, this claim cannot succeed. Sub-section (2) provides: “(2) The total disability benefit on account of accident or disease shall consist of one-half of the amount of the member’s insurance or mortuary benefit remaining unpaid at the date such member is adjudged to be totally and permanently disabled, together with exemption from further taxation of any kind in the Order, except as provided in this section and section 156; which benefit shall be payable in five equal annual instalments”

It seems to me free from any doubt that the word “adjudged” is used not of an adjudication by a court of law or of any other tribunal than that referred to in the succeeding sub-section. Sub-section (3) provides that whenever a member becomes totally and permanently disabled . . . he may, by himself, or, if personally incapable, by some one on his behalf, file notice of such disability

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. . . with the Supreme Secretary—thereupon the Supreme Secretary lays it before the medical officer, who is to make full inquiry and investigation and then report to the Supreme Chief Ranger, “whereupon the Supreme Chief Ranger, if satisfied that the disability is total and permanent within the meaning of the constitution and laws . . . etc. . . . shall instruct the Supreme Secretary to place the member on the probationary list for total disability; but, if the Supreme Chief Ranger does not instruct the Supreme Secretary to place the member on the probationary list, the notice shall become and be null and void and of no effect whatsoever.” When put upon the probationary list, sub-sec. 6 provides that for six months the member shall cease to pay fees, etc., and at the end of that *ipso facto* return to his former status, “unless he is adjudged to be still totally and permanently disabled as in this section provided.” If this disability does continue, he sends a claim to the Supreme Secretary; this is again submitted to the medical officer, and he reports to the Supreme Chief Ranger; and, if the Supreme Chief Ranger is satisfied that the member is totally and permanently disabled, he shall forthwith order the payment of the claim—sub-sec. 7; but, if not, he may restore the member to his former status or make further inquiry—sub-sec. 8; while, if the member does not send in this claim, he at a certain fixed time *ipso facto* returns to his former status—sub-sec. 11.

In case of insanity the benefit may be paid to the wife—sub-sec. 12; and in any case, after the benefit is paid the member is not called upon for further fees, but becomes and continues to be an honorary member of the Order.

While sub-sec. 1, giving the right to the total disability benefit, conditions this right upon the member becoming disabled, the amount of such benefit is not anywhere fixed except in sub-sec. 2; and that sub-section fixes the amount at one-half the amount of the insurance benefit remaining unpaid at the date of such member being adjudged to be totally and permanently disabled. Before the amount can be arrived at, there must be an adjudication, and that adjudication is, as it would appear, an adjudication by the Supreme Chief Ranger. If such an adjudication is desired on behalf of a member, a method is provided by the constitution; but, if the member for any reason prefers to remain an ordinary member, there is no reason why he should not do so—if he takes

the benefit he ceases to be an ordinary member and becomes an honorary member, and thereby loses the right to free medical attendance and the attendance of brethren as sick committee and watchers by his bedside. He may desire to retain these advantages; in that case he goes on paying his fees—or he may take his benefit and thereby lose the advantages spoken of. That he must be a member in good standing when he applies for his benefit, I think clear from the whole constitution; sec. 158 (6) may be specially referred to as shewing that he ceases to pay dues, etc., only on being put on the probationary list.

Much as we may regret the result, I think that this unfortunate man has failed to live up to the requirements of his Order, and that the action fails.

The appeal should be allowed and the action dismissed, both with costs, if asked for.

The above result has been arrived at quite irrespective of the express provision of the certificate “if the party of the second part be not in good standing . . . this contract as against the said the Supreme Court, the party of the first part, shall be deemed to be and shall be absolutely void to all intents and purposes whatsoever,” and also irrespective of the statute of incorporation, sec. 10: “. . . no member or his beneficiary shall be entitled to any pecuniary benefit of the society during the time such member is in default with respect to any . . . dues . . .”

TEETZEL, J.:—The facts are not in dispute and are sufficiently detailed in the judgment of my brother Riddell. The failure of McCuaig to comply with the conditions of sec. 158 of the defendants’ constitution and laws, and his subsequent suspension for non-payment of dues, are, I think, fundamental objections to the plaintiff’s right to recover under the certificate of insurance, unless effect can be given to Mr. Fripp’s argument that McCuaig’s insanity excused him from taking the steps necessary to have his name placed in the probationary list.

It is to be observed that the notice (form 36) under sub-sec. 3 of sec. 158 may be given by the member, “or, if personally incapable, by some one on his behalf,” and that the notice (form 37) under sub-sec. 7 may be given by the member “or some one on his behalf if he is mentally incapacitated.”

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The express provision for the contingency of mental incapacity would take the case out of the principle of such cases as *Taylor v. Caldwell* (1863), 3 B. & S. 826, and subsequent cases, where it has been held that performance of an agreement is excused upon something having ceased to exist, when it is apparent from the nature of the contract that the parties contracted upon the basis of its continued existence. See *Gamble v. Accident Assurance Co.* (1870), Ir.R. 4 C.L. 204.

Besides being clearly a part of the contract between McCuaig and the defendants, the provisions of sec. 158 and of the other sections to which the right to recover for total disability is made subject, appear to be reasonable and proper for the mutual protection of the defendant Order and its members, and their observance by a member would not in its nature be essentially different from a payment of assessments or dues.

While the point does not seem to have been considered in any of our own Courts, it has been held in a number of the Courts of the United States of America that where there is no provision of the contract of insurance which declares, either expressly or by necessary implication, that insanity or similar incapacity shall excuse the non-payment of an assessment on the day it is due, relief cannot be granted against such contingency. See *Bacon on Benefit Societies and Life Insurance*, 3rd ed., sec. 384, and cases there cited.

It seems to me this view is well supported upon principle and should be adopted by this Court.

In *Walsh v. Cosumnes Tribe* (1895), 108 Cal. 496, a case not unlike this in its circumstances, it was held that where a member of a benefit society was declared insane by the Superior Court of the county in which he resided, and committed to the asylum for the insane, where he remained sick and unable to attend to any business until he died, his administratrix could not recover sick benefits under the by-laws of the Order, where there was no compliance with the by-laws in sending to the Order a properly attested statement of the case. The reasons given for this conclusion are at p. 500 of the judgment, as follows: "We find no such exception or exemption in the constitution or by-laws of defendant, and we are not referred to any principle or authority which, in the absence of such exception, makes the insanity of a

member an excuse for non-compliance with the requirement. The requirement is a reasonable and proper one, and intended for the mutual protection of the tribe and its members. It forms a part of the contract between the tribe and its members, by which they are equally bound, and we perceive no good reason why it should not be held binding in this instance. The insanity of Walsh did not prevent a compliance; the act required was one that could be performed by a third party in his behalf, and, in fact, even in any ordinary illness not involving mental incapacity, would usually be so performed."

In this case everything required to be done by McCuaig could have been done by a member of his family on his behalf, and, as already pointed out, the constitution and laws make express provision for the case of this being done where the member himself is incapacitated.

The appeal must, therefore, be allowed with costs, if asked by the defendant Order, which it is to be hoped it may not do, in view of the unfortunate circumstances of this case, and particularly in view of the fact that the defendant has been relieved of substantial liability by the want of knowledge on the part of McCuaig's family as to their duties and rights.

FALCONBRIDGE, C.J.:—I agree that this appeal must be allowed and the action dismissed—with costs if exacted.

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RE ROGERS AND MCFARLAND.

Appeal—Mining Act of Ontario, 1908, sec. 151 (3)—“Deemed to be Abandoned”—Power to Extend Time.

Section 151 (3) of the Mining Act of Ontario, 1908, provides that unless an appeal (to a Divisional Court of the High Court) is set down and a certificate of such setting down lodged within a specified time, “the appeal shall be deemed to be abandoned:”—

Held, that “deemed” means nothing less than “adjudged” or “conclusively considered” for the purposes of the legislation.

Review of the authorities.

And where the time for lodging a certificate had expired and no certificate had been lodged when a motion to quash an appeal which had been set down came on for hearing, the appeal was quashed, the Court having no power to extend the time.

Reekie v. McNeil (1899), 31 O.R. 444, followed.

ON the 21st October, 1904, George McFarland located the south 160 acres of lot 3, concession 6, James township, under the Veteran Land Grants Act, 1 Edw. VII. ch. 6; and on the 1st March, 1907, applied to the Department for a patent. On the 22nd March, 1907, Rogers staked out a portion of this as a mining claim, viz., the north-west quarter of the south half of the lot, about 40 acres. On the 3rd April a patent issued to McFarland of the land, granting him expressly all mines and minerals; on the 10th April Rogers's claim was recorded in the office of the Mining Recorder at Haileybury, and on the 12th September, 1907, a certificate of record was issued. The title of McFarland by that time had, through a mesne purchaser, been vested in the James Proprietary Mining Co. The Deputy Minister of Mines, at the instance of this company, applied to the Mining Commissioner for the cancellation of the mining claim and of the certificate of record based thereon; he, after consideration, held the claim invalid and ordered it, as well as the certificate of record, to be cancelled (9th September, 1909). This was entered in the books of the Mining Recorder on the 13th September, 1909. On the 18th September, 1909, a notice of appeal to a Divisional Court was filed in the same office; and on the 15th there was sent to the Bureau of Mines, Toronto, and to the Mining Recorder, at Elk Lake City, a copy of the notice of appeal; and on the same day the solicitors for the James Proprietary Mining Co. were served with the same notice. The case

was set down on fiat on the 1st October, but no order extending the time procured.

Notice was served on behalf of the James Proprietary Mining Co. on the 29th October, 1909, of a motion to quash the appeal, and this motion was heard before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 5th November, 1909.

J. R. Cartwright, K.C., for the Bureau of Mines. Upon two grounds the appeal was incompetent: first, it should have been taken to the Minister under sec. 134 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, as it was in respect of a ministerial duty of the Recorder: *Munro v. Smith* (1906), 8 O.W.R. 452, and (1907) 10 O.W.R. 97; secondly, the provisions of sec. 151, sub-sec. 3, of the same Act were not complied with; the appeal is too late; and so must be "deemed to be abandoned," and should therefore be quashed: *In re Petrakos* (1907), 13 O.L.R. 650. Statutory conditions precedent were not complied with: *The King v. Doliver Mountain Mining and Milling Co.* (1906), 10 Can. Crim. Cas. 405. There is no power to enlarge the time for setting down the appeal: *Reekie v. McNeil* (1899), 31 O.R. 444.

W. M. Douglas, K.C., for Duncan Chisholm. Where a statutory period is mentioned, the Court has no power to relieve: *Munro v. Smith* (*supra*). The recording by the Recorder is a ministerial and not a judicial act. Section 64 of the Mining Act of Ontario states that, certain conditions having been complied with, the Recorder "shall give" a certificate.

A. McLean Macdonell, K.C., for the James Proprietary Mining Co.

F. R. MacKelcan, for L. T. Rogers, the appellant, opposed the motion. Notwithstanding that the time for appeal mentioned in sub-sec. 3 of sec. 151 of the Mining Act of Ontario has elapsed, the Court has power to relieve, and the appeal should be allowed to proceed, as it was only through an oversight that the appeal was not set down in time. The word "deemed" in the phrase "deemed to be abandoned" in the sub-section means "presumed," and not "adjudged," and the presumption is rebuttable: *Milnes v. Mayor, etc., of Huddersfield* (1883), 12 Q.B.D. 443, at p. 449, where Lord Coleridge says that "shall be deemed to belong," in

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that case, meant only for the purpose for which the corporation were empowered to make the by-law. In sec. 92 of the Mining Act of Ontario, when it is desired to make "deemed" mean something stronger, the phrase "deemed conclusively" is used. As to the objection under sec. 134 of the Act, the Recorder in this instance was acting in a judicial capacity, and not in a ministerial one, and the appeal is rightly taken to this Court and not to the Minister. The question here was whether a patent or a mining claim was valid, and so the Recorder had to decide whether he would record the mining claim, or refuse it on account of a patent having been granted to another. As to what are ministerial and judicial functions, see *The King v. Woodhouse*, [1906] 2 K.B. 501.

Cartwright, in reply. The Recorder did not adjudicate; he merely recorded. He gave the certificate as a matter of course. He did not know at the time that there was a Veteran Land Grants claim. As to the word "deemed" in sub-sec. 3 of sec. 151 of the Act, it means adjudged, and not "presumed:" *Lawson v. McGeoch* (1893), 20 A.R. 464; *Campbell v. Barrie* (1871), 31 U.C.R. 279, 291, 292.

November 13. RIDDELL, J. (after setting out the facts as above):—The first ground taken is that this appeal is incompetent, as it should have been taken to the Minister: sec. 134; the second, with which only I deal, is based upon sec. 151 (3) of the Act of 1908, 8 Edw. VII. ch. 21: "(3) The appeal shall be begun by filing a notice of appeal with the Recorder . . . and unless such filing and payment are so made, and unless the appeal is set down and a certificate of such setting down lodged with the Recorder within five days after the expiration of said fifteen days or the further time allowed under sub-section 2 the appeal shall be deemed to be abandoned." The fifteen days named is shewn by sub-sec. 2 to be fifteen days from the filing of the award of the Commissioner or within such further period, not exceeding fifteen days, as the Commissioner or a Judge of the Supreme Court may allow.

The law is that in a case of this kind the order or award of the Mining Commissioner is final and conclusive unless appealed to the Divisional Court within fifteen days after it is filed, unless the Commissioner or a Judge of the Supreme Court give further time,

and that time cannot exceed fifteen days longer, *i.e.*, thirty days after the filing. The appeal being begun by filing a notice of appeal (as was done) "shall be deemed to be abandoned" unless (1) it is set down within five days after the expiration of the fifteen or twenty days, and (2) within the same time a certificate of such setting down is lodged with the Recorder.

Here the order of the Mining Commissioner was filed on the 13th September, 1909: fifteen days thereafter was the 28th September, Tuesday; five days after the expiration of the fifteen days was Sunday the 3rd October, or at the latest Monday the 4th October. Even if a Judge had acted, the time for lodging the certificate of setting down expired before the present time, *i.e.*, on the 18th October. This appeal, by the express words of the statute, must now "be deemed to be abandoned." The result must depend upon the meaning to be attached to the word "deemed."

The word etymologically does not differ from doom, damn, or condemn, but of course etymology is not always a safe guide to the meaning of a word, even in a statute.

I am unable, however, to find anything in the cases, either in England, Ontario, or the United States, which assists the appellant. In some of the cases the word has been considered in such legislation as, *e.g.*, that contained in the present Act in sections such as 48, 78 (4), etc.; but in most of the cases the question was, does the word "deem" mean for all purposes or only for the purposes of the Act?

As an example of the first class of case may be cited *De Beauvoir v. Welch* (1827), 7 B. & C. 266, in which a statute was under consideration which directed the closing up of certain roads unless they "may . . . be deemed proper to be kept open." Little-dale, J., says (p. 278): "The word *deemed* imports . . . that a judgment is to be exercised."

In *In re Shafer* (1907), 15 O.L.R. 266, at p. 273, it was said that "deem" in the Ontario Judicature Act, sec. 81 (2), must mean something in the nature of a decree or judgment.

As examples of the other inquiry, the following cases occur:—

In *Ex p. Walton* (1881), 17 Ch. D. 746, the Bankruptcy Act of 1869 came under consideration, and it was held that the word

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“deemed” in a statute did not necessarily imply “deemed for all purposes.”

Milnes v. Mayor, etc., of Huddersfield, 12 Q.B.D. 443, discussed a by-law which said that the connecting water pipes and works from the street main to the consumer's premises shall be deemed to belong to the corporation. It was held that these did not belong to the corporation for all purposes, but only for the purposes for which the corporation were empowered to pass the by-law. This is much like the case just cited in effect and principle.

In *Lawrence & Sons v. Willcocks*, [1892] 1 Q.B. 696, the Imperial Bills of Exchange Act, 1882 (45 & 46 Vict. ch. 61), sec. 57, was considered. That section says: “Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: (a) the amount of the bill; (b) interest . . . ; (c) the expenses of noting” Lord Esher, M.R., says (p. 699): “‘Deemed to be liquidated damages.’ That means that they are to be deemed to be so, whether they are so or not. Therefore, in applying Order XIV., r. 1, to such a case, the Court is to deem that all those things . . . are liquidated damages . . . the demand for them is a liquidated demand. . . . Whether there is any hardship . . . is really immaterial, for we are bound by the express provisions of the Bills of Exchange Act.” Fry, L.J., says (p. 700): “The section says that all these things may be recovered, and shall be deemed to be liquidated damages. . . . We are bound to give the words of the section their natural meaning, unless some absurdity or injustice arises.” Lopes, L.J., says (p. 701): “. . . Such damages shall be deemed to be liquidated damages. I understand that to mean that, whether the matters specified are strictly speaking liquidated damages or not, for the purposes of the Act they are to be considered to be so.” This corresponds with the decision in the two cases just above cited.

Green v. Marsh, [1892] 2 Q.B. 330. The Act 41 & 42 Vict. ch. 31, sec. 6 (Imp.), provided that a security for money shall be deemed to be a bill of sale; the Act of 45 & 46 Vict. ch. 43, sec. 9, provides that all bills of sale shall be void unless in certain form. The Court held that while the security must be deemed to be a bill of sale, it need not be in the specific form, saying (p. 335): “‘Be deemed to be a bill of sale.’ . . . That must mean that

it is not a bill of sale, but it is to be treated as one for the purpose of registration." The Act of 1878, 41 & 42 Vict. ch. 31, referred to, is a statute for the registration of bills of sale, not prescribing the form. This decision is also in line with the preceding.

In the House of Lords the word was considered in *Hill v. East and West India Dock* (1884), 9 App. Cas. 448. The Bankruptcy Act of 1869, 32 & 33 Vict. ch. 71, by sec. 23, provided that the trustee may disclaim property of the bankrupt burdened with onerous covenants, etc., and thereupon, if it be a lease which is disclaimed, it shall be deemed to have been surrendered on the date of the order of adjudication. Lord Cairns, L.C., says, p. 455: "It says, 'shall be deemed to have been surrendered,' it does not say 'shall be surrendered,' but there shall be a statutory fiction gone through, the result of which is that the lease shall be deemed to have been surrendered." And, after discussing the case of *Ex p. Walton*, 17 Ch. D. 756, he arrives at a conclusion which is perhaps most neatly put by Lord Blackburn on p. 458: "The words here 'shall be deemed to have been surrendered' . . . mean, shall be surrendered so far as is necessary to effectuate the purposes of the Act." Lord Bramwell, in a most interesting and amusing judgment, went further in his views, and thought that the lease was surrendered for all purposes.

In *Earl Cowley v. Inland Revenue Commissioners*, [1899] A.C. 198, "deemed to pass," "deemed to include," were apparently taken for granted as meaning "passing," "including," for the purposes of the Act.

All these cases seem to concur in a definition something like this: "be considered, adjudged, or held for the purposes of the statute."

Some of the earlier English cases may also be looked at as bearing upon the question.

Regina v. Manning (1849), 2 C. & K. 887. The Imperial Act 7 & 8 Vict. ch. 66, sec. 16, enacts "that any woman married . . . to a . . . subject or person naturalized shall be deemed and taken to be herself naturalized. . . ." Pollock, C.B., said: "The obvious, plain, and natural inference from that appears to me to be that she should be considered exactly as if she had been naturalized by Act of Parliament. . . ." Maule and Cresswell, JJ., agreed. Upon a case reserved Wilde, C.J.,

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giving the judgment of the Court, composed of himself, Pollock, C.B., Coleridge and Cresswell, JJ., and Rolfe and Platt, BB., says (p. 903): "We can discover no intention whatever in this Act of Parliament to do more or less than to make her a British subject. . . ." She was hanged.

In *Wolton v. Gavin* (1850), 16 Q.B. 48, the Court considered the Act 10 Vict. ch. 12, which (sec. 55) provided that "every person who shall receive enlisting money knowing it to be such" from certain persons "shall be deemed to be enlisted as a soldier;" and (sec. 57) that having received the recruiting money and not having attended before a justice of the peace within four days, he "shall be deemed to be enlisted and a soldier in Her Majesty's service. . . ." Erle, J., though he differed from the remainder of the Court (Lord Campbell, C.J., Wightman and Coleridge, JJ.), said (p. 72), speaking of sec. 57: "He is only by construction of law deemed to be a deserter, and is not a soldier *de facto*." Coleridge, J., says (p. 81): "I cannot understand any distinction in point of law between a person who, by sec. 55 of the Mutiny Act, is to be 'deemed to be enlisted as a soldier in Her Majesty's service,' and a person who is actually in all respects a soldier *de facto*. Where an Act of Parliament says that a person is to be deemed to be in any particular capacity, surely that must be understood to mean that he is thenceforward taken as actually the very person that he is deemed to be."

The cases in the State and United States Courts of the American Union are pretty uniform:—

Commonwealth v. Pratt (1882), 132 Mass. 246. The statute said: "Whoever embezzles or fraudulently converts to his own use . . . money, goods . . . which may be the subject of larceny . . . shall be deemed guilty of simple larceny." The defendant was charged and found guilty of larceny by embezzlement. The Court said (p. 247): "When, by legislative enactment, certain acts are deemed to be a crime of a particular nature, they are such crime, and not a semblance of it, nor a mere fanciful approximation to or designation of the offence." And (p. 249): "In a legislative enactment the phrase 'shall be deemed guilty of larceny' is equivalent to and means that he is guilty of larceny."

Blaufus v. People (1877), 69 N.Y. 107. The statute disqualified as a witness any person who "shall, upon conviction, be ad-

judged guilty of perjury." The Court, in considering the effect of the word "adjudged," points out that the word "deem" is the equivalent of "judge," referring to Wyclif's translation of the New Testament: "Nyle ye deme, that ghe be not demed."

Kerckhoff-Cuzner Mill and Lumber Co. v. Olmstead (1890), 85 Cal. 80, 24 Pac. R. 648. "Cessation from labour for thirty days upon any unfinished contract . . . shall be deemed equivalent to a completion thereof for all the purposes of this chapter," upon filing liens. The Court held: "The words 'shall be deemed equivalent to a completion' mean 'shall be equal in legal effect to a completion;' that is, shall be treated, for the purpose of filing a lien, as an actual completion."

Cory v. Spencer (1903), 67 Kans. 648, 63 L.R.A. 275, 73 Pac. R. 920. The Constitution of Kansas provided that every white male person of twenty-one years and upwards belonging to certain specified classes should be deemed a qualified elector; and that no one shall be deemed to have gained or lost a residence by reason of absence while kept at any almshouse, etc. This was considered to be equivalent to adjudged or declared—"deemed" or "adjudged" are taken as in effect synonymous.

In *Lawrence v. Leidigh* (1897), 58 Kans. 594, 50 Pac. R. 600, the same question arose as in *Cory v. Spencer*. The Court, after stating the argument that "deem" simply raised the presumption, said that what was meant was that no one shall be adjudged or declared to have gained a residence.

The same point came up in *Powell v. Spackman* (1901), 65 Pac. R. 503, an Idaho case.

In *Kelly v. Owen* (1868), 7 Wall. (U.S.) 496, the same statute was under consideration as in *Leonard v. Grant*, *infra*. The Court says (p. 498): The words "mean that, whenever a woman . . . is in a state of marriage to a citizen, whether his citizenship existed at the passage of the Act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also."

In *Leonard v. Grant* (1880), 5 Fed. R. 11, the words of the statute were "Any woman . . . married to a citizen of the United States . . . shall be deemed a citizen." The plaintiff, an alien, married a citizen of the United States, and the defendant contended that thereby she became a citizen of the United States. The plaintiff contended that she was not absolutely a

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citizen, but only "deemed" to be such by force of the statute, *i.e.*, was only taken, considered, or supposed to be one, which assumption or supposition ceased with the fact upon which it was based, the termination of her relation in marriage with her late husband. The Court held (p. 16): "The word 'deemed' is the equivalent of 'considered' or 'judged;' and, therefore, whatever an Act of Congress requires to be 'deemed' or 'taken' as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly."

The only case I have found which looks the other way is one in Pennsylvania, and that, when carefully examined, does not go very far: *Burrell Township v. Pittsburg Guardians of the Poor* (1869), 62 Pa. St. 472, 474.

Our own cases are also adverse to the appellant's contention, though of course not absolutely conclusive. In *Campbell v. Barrie*, 31 U.C.R. 279, the Insolvent Act, 32 & 33 Vict. ch. 16, was under consideration. Section 86 provides that conveyances, etc., made at a certain time "are presumed to be made with intent to defraud . . . creditors;" sec. 89, that sales, etc., made within thirty days before assignment "shall be presumed to have been . . . made in contemplation of insolvency." The Court, Wilson, J. (Morrison, J., concurring, Richards, C.J., taking no part), considered (p. 290) that "presumed to be made" in sec. 86 should be read as "deemed to be made," and consequently meant "are void." It is not necessary to consider whether the Court was right in identifying the meaning of "presume" with "deem"—it does not seem to have been considered that there was any doubt as to the meaning of "deem." So in speaking of sec. 89 the Court asks: "Should the word *presumed* be read *deemed*?" And on p. 292, *Nunes v. Carter* (1866), L.R. 1 P.C. 342, is cited. In that case the Jamaica Insolvent Act of 11 Vict. ch. 28, by sec. 67, provided that if any person in contemplation of insolvency transferred any of his estate to any creditor for the benefit of such creditor, such transfer should be deemed fraudulent and void against the official assignee: provided that no such transfer should be so deemed fraudulent and void unless made within six months before a declaration of insolvency. It was held in the Jamaica Court, by a divided Court, that, although there was no evidence

of fraudulent preference, a transfer of property by an insolvent within six months before a declaration of insolvency was absolutely void. In the Judicial Committee it was argued that the real question was whether there was a fraudulent preference, but their Lordships declined to take that view.

In *Lawson v. McGeoch*, 20 A.R. 464, there was much difference of judicial opinion as to the meaning of the word "presumed" in R.S.O. 1887, ch. 124, sec. 2, sub-secs. 2 (a), 2 (c). Mr. Justice Osler thought the presumption general and irrebuttable; Mr. Justice MacLennan that it was limited to cases of pressure, but irrebuttable; while Hagarty, C.J.O. (*hesitante*), and Burton, J.A., thought it rebuttable. The Chief Justice, however, says (p. 467): "If here, as in the Jamaica case of *Nunes v. Carter*, L.R. 1 P.C. 342, the word had been 'deemed,' there would be no difficulty;" while Burton, J.A., seems to approve (p. 468) of the reasoning and conclusions of Wilson, J., in the case of *Campbell v. Barrie*, 31 U.C.R. 279, considering that "presumed" meant "deemed," and therefore that the presumption was irrebuttable. On p. 469 the same learned Judge says: "We should be prepared to find that if intended to be conclusive the Legislature . . . would have used some other word such as . . . 'deemed' or a similar expression. . . ."

It would, I think, be quite impossible for us, so far as the authorities go, to hold that "deemed" means anything less than "adjudged" or "conclusively considered" for the purposes of the legislation.

Neither am I at all impressed with the circumstance that in sec. 92 a discovery not appealed against or finally allowed on appeal is to be deemed conclusively to be a discovery of valuable mineral in place; the expression is explained immediately afterwards—it cannot be called in question in any cause, matter, or proceeding in any Court or under this Act. Quite a different case is being provided for in the two sections. But in any case the meaning of the word "deemed" is not, in my view, to be cut down because of the circumstance that the Legislature have in another used a pleonastic expression. We have "full and complete" and the like used when one of the words would do as well—a term is "fully to be complete and ended"—"fully paid-up shares" are nothing but "paid-up" shares.

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The word "deem" is used in many places in this Act. In some instances it refers to the judgment of some officer, *e.g.*, secs. 48, 78 (4), 80 (1), 86, 123 (1), 133 (1) (3), 137 (2) (5), 138, 139 (1), 167 (3), 187 (1) (2). Leaving aside these sections, we find by sec. 27 (4) the license shall be deemed to be the license of the licensee; sec. 38, a water power of a certain kind shall not be deemed part of the claim; sec. 83, non-compliance with any requirement of the Act shall be deemed to be an abandonment; sec. 129, the Court may transfer any case to the Commissioner which should have been brought before him, and thereafter it shall be deemed to be a proceeding before him; sec. 162, an abandoned mine not properly fenced shall be deemed to be a nuisance. In all these there can be no doubt of the meaning of the word.

Where the Legislature has placed such a bar to our entertaining an appeal, we have no power to extend the time: *Reekie v. McNeil*, 31 O.R. 444, and cases cited. And the provision in sec. 153 of the Act that the practice and procedure on an appeal to the Divisional Court shall be the same as in ordinary cases under the Judicature Act, does not assist the appellant any more than the similar provision in the County Courts Act, R.S.O. 1897, ch. 55, sec. 40, assisted the appellant in *Reekie v. McNeil*.

In my opinion, the appeal should be quashed, with costs of a motion to quash only. We have not heard the merits.

FALCONBRIDGE, C.J.:—I agree.

As to the meaning of the word "deemed," I refer also to *The Queen* (1869), L.R. 2 Ad. & Ecc. 354; *Lowe v. Dorling & Son*, [1906] 2 K.B. 772; *Shepherd v. Broome*, [1904] A.C. 342.

The appeal will be quashed with costs as of a motion to quash only.

BRITTON, J., concurred.

[IN THE COURT OF APPEAL.]

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Trespass—False Imprisonment—Warrant of Arrest—Delay in Issue—Convict out on Bail—Commencement of Term of Imprisonment—R.S.C. 1906, ch. 148, sec. 3—Application to Summary Conviction under Provincial Statute—Liability of Municipal Corporation for Acts of Constable.

On the 17th January, 1907, the plaintiff was convicted by the police magistrate for the town of North Toronto as for a second offence of having sold intoxicating liquor without a license contrary to the provisions of the Liquor License Act, and was adjudged to be imprisoned therefor for four months. He was allowed to go at large, upon his own recognizance to appear when called upon, until the 28th March, when he was arrested by M., a constable of the town of North Toronto, under a warrant of commitment issued by the magistrate (without notice to the plaintiff) on the 27th March, and delivered to the keeper of the gaol, who was thereby directed to receive the plaintiff and keep him in custody for four months. On the 28th June, 1907, the plaintiff was discharged (*Rex v. Robinson*, 14 O.L.R. 519), on the ground that the term of his imprisonment had expired on the 17th May, 1907. This action was brought against M. and the town corporation for trespass and false imprisonment. A notice of action was served on the 18th September, 1907, the cause of action stated being the assault and false imprisonment of the plaintiff from the 17th May until his discharge:—

Held, that, if sec. 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, did not apply to a commitment on summary conviction for an offence against an Ontario Act, the term of imprisonment under the conviction would not commence until the plaintiff's arrest or his lodgment in gaol; but, if the enactment did apply, the plaintiff was in fact out on bail—whether regularly and properly or not—from the date of the sentence till the 28th March, and, by the very terms of the section, the intermediate period was not to be reckoned as part of the term of imprisonment. The imprisonment was, therefore, lawful, and the action failed.

Rex v. Robinson (1907), 14 O.L.R. 519, overruled.

The King v. Taylor (1906), 12 Can. Crim. Cas. 244, approved.

M. was not the servant or agent of the town corporation in executing the warrant, and there was no ground for making the corporation a party. Judgments of MAGEE, J., and a Divisional Court, affirmed.

APPEAL by the plaintiff from the judgment of a Divisional Court affirming the judgment of MAGEE, J., at the trial, dismissing the action.

The following statement of the facts is taken from the judgment of OSLER, J.A.:—

The action was for trespass and false imprisonment. The statement of claim alleged that the defendant Morris was a constable of the town of North Toronto, in the county of York, and that on the 17th May, 1907, by force of a warrant issued and delivered to him by Peter Ellis, police magistrate for the said town, in execution of a conviction theretofore made by such police magis-

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trate, the defendant Morris caused the plaintiff to be assaulted and imprisoned in the common gaol of the county of York, from that day until the 28th June following, when he was discharged therefrom under a writ of habeas corpus.

The defendant Morris pleaded not guilty by statute, R.S.O. 1897, ch. 88, secs. 1, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24.*

At the trial it appeared that on the 17th January, 1907, the plaintiff was convicted before the police magistrate for the town of North Toronto as for a second offence of having sold liquor without license contrary to the provisions of the Liquor License Act, and was adjudged to be imprisoned therefor for the term of four months without hard labour. Something being then said of the plaintiff's intention to appeal or to move in some manner against the conviction, he was allowed to depart, on his solicitor's undertaking that he would appear again when necessary, and no warrant of commitment was then issued. The undertaking seems to have been withdrawn on the same day, and the magistrate was requested by the solicitor to admit the plaintiff to bail. Word was sent to the plaintiff by the magistrate to return to the court, and, upon his doing so, his own recognizance was taken "to appear at the police court, when called upon to do so by the proper tribunal, and there surrender himself into the custody of the court." He was thereupon allowed to go at large, but, finding that nothing was being done towards moving against the conviction, the magistrate on the 27th March, 1907, without further notice to the plaintiff, issued a warrant of commitment directed to the constables of the town, and placed it in the hands of the defendant Morris, by whom, under the authority of the warrant, the plaintiff was on the 28th March arrested and delivered, together with the warrant, to the keeper of the county gaol, who was thereby directed to receive the plaintiff and keep him in custody for four months.

In the month of April, 1907, the plaintiff obtained a writ of habeas corpus and moved for his discharge, on what precise ground is not stated, but probably because of some formal irregularity

* As against the other defendants, the Corporation of the Town of North Toronto, the plaintiff alleged that they, by their servant and agent, the defendant Morris, assaulted and imprisoned the plaintiff. The defendant corporation denied that the defendant Morris was their servant or agent in relation to the matters complained of.

which appears in the warrant, but a conviction and new warrant supposed to be regular, or sufficiently regular to detain him, having been put in pending the application, he was remanded, with liberty to apply for a new writ if he should be detained longer than four months after the date of the conviction, *i.e.*, beyond the 17th May, though the period mentioned in the warrant would not expire until the 28th July. Another writ was accordingly obtained on the 25th June, under which, on the 28th June, the plaintiff was, by order of Riddell, J., discharged, on the ground apparently that, the plaintiff not having been guilty of an escape, and the recognizance of bail having been taken without jurisdiction and as the mere voluntary act of the magistrate, the term of imprisonment commenced and ran from the date of the conviction, and therefore expired on the 17th May, notwithstanding that the plaintiff had been at large between the 17th January and the 28th March.

A notice of action was served on or about the 18th September, 1907, the cause of action therein stated being the assault and the false imprisonment of the plaintiff from the 17th May until his discharge upon the writ of habeas corpus; and about the 25th September demand of perusal and copy of the warrant, pursuant to 24 Geo. II. ch. 44, sec. 6 (R.S.O. 1897, vol. 3, ch. 326), was served upon the defendant Morris.

The notice was not complied with, and for this reason the defendant Morris was not allowed at the trial to amend his defence by pleading the statute.

The learned trial Judge held that, assuming the term of four months' imprisonment to have expired on the 16th May, the gaoler was from that date detaining the plaintiff upon his own responsibility, and, assuming the warrant to have been irregular in its inception, the defendant Morris would be responsible only for the period from the 28th March to the 16th May, while the notice of action only gave him notice that he was intended to be sued for a trespass and imprisonment after the latter date. He therefore held the notice insufficient, the defendant not being responsible for the trespass and imprisonment during the period in respect of which it was given.

The judgment was affirmed by the Divisional Court, it is presumed on the same grounds, as no reasons are reported.

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The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MAC-LAREN, and MEREDITH, JJ.A., on the 27th and 28th September, 1909.

J. B. Mackenzie, for the plaintiff. The magistrate by taking a recognizance of bail substituted the goods of the plaintiff for his person. There cannot be a suffering in person and in pocket at the same time: *Sinden v. Brown* (1890), 17 A.R. 173. The magistrate would be liable under that case. There was no notification that the condition of the recognizance was forfeited before the plaintiff was placed under arrest and conveyed to gaol. The term of imprisonment begins when the decision is rendered: R.S.C. 1906, ch. 148, sec. 3. The prisoner was placed in confinement by the act of the defendant Morris. Where the conviction is not mentioned in the warrant of commitment, the warrant is bad: *Rex v. Nelson* (1908), 18 O.L.R. 484. It is not necessary that the conviction should be quashed: *Sinden v. Brown*, *supra*. Only a conviction for a second offence would warrant imprisonment. It is not necessary to fasten knowledge of the recognizance on Morris; if there was no jurisdiction in the magistrate to issue the warrant and deliver it to Morris, the latter is liable: *Jones v. Vaughan* (1804), 5 East 445; *Arnott v. Bradley* (1873), 23 C.P. 1. It was thought in the Court below that the plaintiff had misconceived his remedy. That is answered by *Moriarity v. Harris* (1905), 10 O.L.R. 610. It is said that the plaintiff has not stated the cause of action in the notice of action. No other action but trespass would lie. The prosecutor is liable in trespass for want of jurisdiction in the magistrate: *Hunt v. McArthur* (1865), 24 U.C.R. 254, 256; *Graham v. McArthur* (1866), 25 U.C.R. 478. The expression "duly convicted" in the warrant refers to the prior conviction—there is no recital of a conviction to warrant the commitment. As to the power to substitute a warrant, see *Ex p. Hamilton*, 2 N.Z. Jur. R.N.S.S.C. 208, found in the New Zealand Digest (1861-1892), col. 345. Other cases on the same lines as *Rex v. Nelson*, *supra*, are: *The Queen v. Lalonde* (1895), 9 Can. Crim. Cas. 501; *The King v. Cooper* (1796), 6 T.R. 509. In support of the decision of Riddell, J., in *Rex v. Robinson* (1907), 14 O.L.R. 519, discharging the plaintiff from custody, I cite *Ex p. Gervais* (1883), 6 L.N. (Que.) 116, and *In re Hénault* (1883), *ib.* 121. The magistrate cannot suspend the sentence. The only

sections of the Criminal Code bearing on this are 722 and 745, and neither applies. There is no authority for taking a recognizance. There can be no suspension of a warrant in the hands of a constable: *Barons v. Luscombe* (1835), 3 A. & E. 589. The magistrate could no more take a recognizance than withdraw the warrant. In *Bartram v. Hill* (unreported, 5th March, 1889) this Court held that there was no power to withdraw a warrant. The defence raised is that the constable ought to have been sued for acting in his office maliciously and without reasonable and probable cause. That could not be maintained in face of *Jones v. Vaughan*, 5 East 445. There was no power in the Judge discharging the plaintiff to restrain him from bringing an action: *Rex v. Lowery* (1907), 15 O.L.R. 182. The sentence begins from the time it is imposed: *The Queen v. Johnson* (1901), 4 Can. Crim. Cas. 178. The defendant Morris was not a public officer outside of North Toronto, and he is not protected by any statute. The other man, Thompson, who acted in the arrest, was a special constable employed by the corporation of North Toronto. The warrant must contain a direction which entitles the constable to act. The notice of action is sufficient: *Connolly v. Adams* (1854), 11 U.C.R. 327; *Jacklin v. Fytche* (1845), 14 M. & W. 381; *Jones v. Bird* (1822), 5 B. & Ald. 837; *Connors v. Darling* (1864), 23 U.C.R. 541; *Madden v. Kensington Vestry*, [1892] 1 Q.B. 614; *Bond v. Conmee* (1889), 16 A.R. 398. The act by which the plaintiff was injured was the issue of the warrant when the magistrate had no jurisdiction. The imprisonment being a continuing one, the defendant cannot mistake the cause of action, and the notice of action is sufficient: *Oliphant v. Leslie* (1865), 24 U.C.R. 398. *Poley v. Fordham* (1904), 91 L.T.N.S. 525, shews how far the doctrine is extended. *Moriarity v. Harris*, 10 O.L.R. 610, is founded on that. The warrant is no protection to the constable or his assistant: *Daniel v. Philipps* (1835), 5 Tyrw. 293; *Wickes v. Clutterbuck* (1825), 2 Bing. 483. The by-laws of the corporation of North Toronto make them liable. They have power to appoint a chief constable, but no power to appoint a special constable. Thompson did not act within the municipality. Morris was a county constable; Thompson was not. The municipality are liable for authorising what they had no right to authorise. See *Hesketh v. City of Toronto* (1898), 25 A.R. 449.

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C. J. Holman, K.C., for the defendant Morris. We have nothing to do with the regularity or irregularity of the proceedings of the magistrate. The only thing done by the defendant Morris was the delivery of the plaintiff to the gaoler on the 28th March, 1907, and the plaintiff is seeking to fix a liability upon Morris because the gaoler retained the plaintiff in custody after the 17th May, 1907. It is not for the constable to consider the validity of the warrant; he is bound to act upon it: *Regina v. King* (1889), 18 O.R. 566, 572. The magistrate had jurisdiction in the place where the offence was committed. Sections 1 to 23 of R.S.O. 1897, ch. 88, are by sec. 1, sub-sec. 2, made applicable to constables; and by sec. 13 no action shall be brought unless within six months after the act complained of. The action was not commenced until the 5th November, 1907, which was more than six months after the 28th March. The plaintiff did not establish at the trial, under sec. 19 of the Act, that the action was brought within the time limited, nor prove the cause of action stated in the notice. The notice of action complained of an act done on the 17th May, and no act of Morris was shewn on that day. Morris was a constable fulfilling a public duty, and the action was brought for something done in the performance of that duty, and it was not shewn that the act was done maliciously and without reasonable and probable cause, as required by sec. 1 of ch. 88: see *Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522; *Gaul v. Township of Ellice* (1902), 3 O.L.R. 438; *Taylor v. Nesfield* (1854), 3 E. & B. 724. Morris is entitled to protection under the order of Riddell, J. Even at common law Morris is protected by the warrant: *Regina v. King*, 18 O.R. 566, at p. 571.

T. A. Gibson, for the defendants the Corporation of North Toronto. The defendant Morris and the assistant, Thompson, were acting as police officers in the discharge of duties imposed by the provincial government, and the municipality are not liable for their acts: *McSorley v. Mayor, etc., of St. John* (1882), 6 S.C.R. 531; *McCleave v. City of Moncton* (1902), 32 S.C.R. 106; *Butler v. City of Toronto* (1907), 10 O.W.R. 876; *Nettleton v. Town of Prescott* (1908), 16 O.L.R. 538.

Mackenzie, in reply. *Regina v. King*, 18 O.L.R. 566, is not applicable here. The constable would have been absolutely protected if he had pleaded the Act 24 Geo. II. ch. 44, sec. 6 (R.S.O.

1897, ch. 326) and made the magistrate solely liable. The question of good faith does not arise except in regard to the notice of action: *Prickett v. Gratrex* (1846), 8 Q.B. 1020.

November 15. OSLER, J.A. (after setting out the facts as above):—The defendant Morris neglected to comply with the demand for perusal and copy of his warrant, and he is therefore not entitled to the protection of the statute R.S.O. 1897, vol. 3, ch. 326; but, as the notice of action limits the plaintiff's cause of action to an arrest and false imprisonment for the period between the 17th May and the date of his discharge, during which time he was in custody upon an apparently regular warrant, it seems necessary only to consider whether his term of imprisonment was then lawfully running or whether it had expired on the 17th May. The Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 3, enacts that "the term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the imprisonment to which he is sentenced." This provision seems pointed to the case of a person actually in custody at the time of his trial and sentence, and, looking at its origin—4 & 5 Vict. ch. 24, sec. 52—and the course in which it re-appears in legislation—C.S.C. ch. 99, sec. 106; 32 & 33 Vict. (D.) ch. 29, sec. 91 (the Criminal Procedure Act); R.S.C. 1886, ch. 181, sec. 28 (6); and the Criminal Code, 1892, 55 & 56 Vict. ch. 29, sec. 955—there is room for doubt whether it was ever intended to apply to commitments on summary convictions, and it is, moreover, questionable whether by force of sec. 2 (1) of the Ontario Summary Convictions Act it could apply to summary convictions and commitments for offences under the Liquor License Act or other Ontario Acts. If the section does not apply—and it is not now necessary to decide the point—the term of imprisonment under such a conviction would only commence, as I think the law has hitherto been generally understood to be, at the date of the defendant's lodgment in gaol under the warrant. See Paley on Summary Convictions, 8th ed., p. 357; *Bowdler's Case* (1848), 12 Q.B. 612, 619; *Ex p. Foulkes* (1846), 15 M. & W. 612; *Braham v. Joyce* (1849), 4 Ex. 487; *Henderson v. Preston* (1888), 21 Q.B.D. 362; *The Queen*

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v. *McDonald* (1898), 6 Can. Crim. Cas. 1; 25 Am. & Eng. Encyc. of Law, 2nd ed., pp. 326, 327. See also *The King v. Taylor* (1906), 12 Can. Crim. Cas. 244.

On the other hand, if the enactment does apply to a sentence under a summary conviction, the plaintiff was in fact out on bail from the date of the sentence until the 28th March, and therefore, by the very terms of the section, the intermediate period was not to be reckoned as part of the term of imprisonment to which he was sentenced, a term which would not in this view expire until the 28th July. The evidence at the trial makes it perfectly clear that he was admitted to bail at his own request, or that of his solicitor, in substitution for the latter's undertaking, and not at the instance of the magistrate, and, though the act of the magistrate was illegal, there being no appeal from a conviction for selling liquor without license, I do not see how that can make any difference if in fact the plaintiff was out on bail—a situation the magistrate might, in my opinion, lawfully terminate at any time by issuing the warrant of commitment, which should never have been suspended. Whether, if the plaintiff was irregularly or unlawfully at large on bail, it would amount to an escape within the relative sections of the Criminal Code, 185, 189, 195, 196, is to my mind somewhat doubtful, and I do not decide the point.

It was objected that there was no proof of the defendant Morris being a constable. It was enough that he appeared to have been acting as such: the regularity of his appointment would be presumed. But there was, in addition, some evidence of his actual appointment as a county constable.

The town of North Toronto was made a defendant, it is impossible to understand on what ground, as the defendant Morris was neither its servant nor agent in executing the warrant.

For these reasons, I am of opinion that the judgment should be affirmed.

MEREDITH, J.A.:—This case presents, to my mind, no real difficulty.

The plaintiff having been convicted of an offence under the Liquor License Act, at the instance of counsel acting for him, with the view to appealing against the conviction (whether an appeal lay or not is not very material), the usual proceedings for

the enforcement of the conviction were delayed, and the plaintiff bailed to appear when called upon, his own recognizance alone being taken. Subsequently, no proceedings by way of appeal or otherwise having been taken by the plaintiff to question the validity of the conviction, it was acted upon, without the plaintiff having been called upon to appear under his recognizance. The conviction was made on the 17th January; and the plaintiff was arrested and imprisoned under it on the 27th March following.

Under habeas corpus proceedings, the plaintiff was discharged from custody in the following month of June, on the ground that the term of imprisonment began on the 17th January, not on the day of his arrest, and that it had expired when those proceedings were taken. The learned Judge who made the order thought that R.S.C. 1906, ch. 148, sec. 3, applied and had that effect.

He also held that the plaintiff was not at large without lawful cause, under the recognizance, and so had not been guilty of an escape, and could not be treated as if so guilty, under R.S.C. 1906, ch. 146, sec. 196. But, if the plaintiff were lawfully out on bail, the time would not count; whilst, if unlawfully, it would be an escape, and equally the time would not count. He did not say, in his reported reasons—14 O.L.R. 519—why he did not give effect to the provisions of sec. 3 of ch. 148, R.S.C. 1906, that “no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.” Nor did he say why the case might not properly be treated as one in which the sentence directed that the imprisonment should not begin until the time allowed for taking steps to question the conviction had elapsed, which would be within another exception to the statutory provision: see *The King v. Taylor*, 12 Can. Crim. Cas. 244.

Assuming that enactment to be applicable to such a case as this, without at all saying that it is, why should not each of these provisions be applicable to this case? The plaintiff was certainly “out on bail” from the time of his trial until his imprisonment, and the magistrate certainly in effect directed that the term of imprisonment should not begin until the warrant was issued. We are now dealing with a claim for damages only; and in such a case how can the plaintiff, who gave his recognizance to appear, and for whose benefit alone the delay was permitted, be heard now

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to say that he should have damages because he was not refused benefit of them—not immediately thrown into prison?

I think the imprisonment was lawful; and would have been lawful had the full term been served; the action, therefore, in my opinion, failed, and was properly dismissed, as this appeal should be.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., agreed in the result.

[IN THE COURT OF APPEAL.]

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Nov. 15.

OVEREND V. BURROW STEWART AND MILNE CO.

Patent for Invention—Infringement—Novelty—Utility—Burden of Proof—Earlier Patent—Disclosure of Invention—Failure to Manufacture—Failure to Mark Articles—Patent Act, secs. 38, 55, 69—Penalty—Injunction—Damages—Costs.

The plaintiff in 1896 obtained a patent for improvements in currycombs, the invention of B. An earlier patent had been granted to B., intended to cover the same invention, but it was not kept on foot. The invention in effect consisted in a new arrangement of the face of a currycomb by so forming the edges of and correlating the teeth as to produce an effectual cleanser while doing away with some sources of irritation and possible injury to the animal's hide:—

Held, upon the evidence, that the patent was for a new and useful invention, that it had not been anticipated, and that B. was the true and first inventor. Where a device is new and useful very little invention suffices to support the patent. The onus of shewing want of novelty and usefulness is on the party setting up these defences.

It was contended that the description in the specification of B.'s earlier patent disclosed the plaintiff's invention, and so made it public as to render ineffectual the issue to the plaintiff of his patent as a protection against user by the public of the invention therein described:—

Held, that a comparison of the specifications, drawings, and claims of the two patents shewed that the earlier ones did not cover the invention patented by the plaintiff.

Held, also, upon the evidence, that there had been a sufficient compliance with sec. 38 of the Patent Act by manufacturing the article.

Held, also, that the only consequence of a failure properly to mark the articles, as required by sec. 55 of the Act, is a penalty imposed by sec. 69; but, even under the United States law, the failure to mark does not affect the right to an injunction, but goes only to damages.

Judgment of ANGLIN, J., awarding the plaintiff an injunction restraining the defendants from infringing his patent, and a small sum for damages, with the costs of the action, affirmed.

Semble, if the discretion exercised as to costs were open to review, that it was properly exercised, as the defendants had contested the plaintiff's right throughout, and made sales after being notified of the infringement.

APPEAL by the defendants from a judgment of ANGLIN, J., at the trial, awarding the plaintiff an injunction restraining the de-

fendants from infringing, in the manufacture and sale of currycombs, the plaintiff's patent, number 53318, and the sum of \$20.80 as and for damages, and the costs of the action.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The plaintiff's patent was granted to him on the 24th August, 1896, and purports to be for certain improvements in currycombs, the invention of one F. H. Burke.

There was an earlier patent, number 49400, granted to F. H. Burke on the 5th July, 1895, intended to cover the same invention as that covered by the patent to the plaintiff. It was not kept on foot, and some of the questions in issue in this action are based upon the specifications and claim upon which it was granted.

Although in their statement of defence the defendants denied that they infringed the plaintiff's patent, the evidence at the trial conclusively established that the defendants manufactured and sold a currycomb which was an exact copy of that manufactured under the plaintiff's patent, and it is not now disputed that, assuming the validity of that patent, there has been an infringement.

But the defendants attack the validity of the patent, and put forward a number of objections, all of which have been determined adversely to them by the learned trial Judge.

They first impeach the novelty and usefulness of the invention, and say that in any case Burke, the alleged inventor, was not the true and first inventor. They also say that the device which the plaintiff has patented was well known to and used by others prior to Burke's alleged invention, and the issue of a patent therefor; that, in fact, there was anticipation of the alleged invention.

These objections are directed to the right to the issue of a patent for the alleged invention and to the validity of the patent as not covering an invention that could properly form the subject of a valid patent.

Then they take further objections tending to destroy the patent or render it invalid as a protection to the invention, based on neglect of or want of compliance with the requirements of the Patent Act.

They say that the plaintiff did not comply with the condition of sec. 38 of the Patent Act, providing that a patent and all rights and privileges thereby granted shall cease and determine and the

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patent be null and void at the end of two years from its date, unless the patentee or his legal representatives within that period, or an authorised extension thereof, commence and thereafter continuously carry on in Canada the construction or manufacture of the invention patented, in such manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada.

They further say that the plaintiff did not comply with sec. 55 of the Patent Act, requiring every patentee to stamp or engrave the year of the patent on each patented article sold or offered for sale by him in some one of the ways specified in that section; and that, if the effect of the failure to comply with the directions of the section is not an invalidation of the patent, the defendants were misled to their damage by such failure, and the plaintiff should not have been awarded costs. On the argument of the appeal the objection virtually resolved itself into the latter contention.

The appeal was heard on the 15th October, 1909, before Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

G. Lynch-Staunton, K.C., for the defendants. The invention of the plaintiff, as shewn in Canadian patent number 53318, lacked usefulness and novelty, and was therefore not patentable. The patent of 1895 has lapsed. It is admitted that the patent of 1895 was not new. The plaintiff says that the latest patent, number 53318, discloses a secret of invention which was not disclosed in the patent of 1895. I contend that there was disclosure of it in the 1895 patent. But, if there was not—if the earlier patent did not disclose the original idea—it could have been changed and re-issued. The plaintiff is simply trying to patent the latest one in order to save the earlier one, which had lapsed. The trial Judge has found that the only claim to novelty consists in "each tooth having its highest point out of alignment with the adjacent tooth." He does not say that alternate teeth are not in alignment. I contend that it is impossible in mechanics to make a corrugated surface without having teeth out of alignment, or rather corrugated. It is simply a mechanical result; it is nothing new; and so it is not patentable: *Gillette Safety Razor Ltd. v. Pellett Ltd.* (1909), 26 Rep. Pat. Cas. 588; *Gillette Safety Razor Co. v. A. W. Gamage Limited* (1909), 25 Times

L.R. 808; *Corser v. Brattleboro Overall Co.* (1899), 93 Fed. R. 809; *Beecher Manufacturing Co. v. Atwater Manufacturing Co.* (1885), 114 U.S. 523; *American Road Machine Co. v. Pennock and Sharp Co.* (1896), 164 U.S. 26, at p. 41; *Hill v. Thompson* (1817), 3 Mer. 622, 17 R.R. 156. Fulton on Patents, 2nd ed., p. 45 *et seq.*, sets out fully what is required to constitute accuracy of description, novelty, and usefulness. The plaintiff did not comply with sec. 55 of the Patent Act, R.S.C. 1906, ch. 69; nor with sec. 38 of the same statute. The defendants were misled, and should not have been ordered to pay costs.

A. W. Anglin, K.C., and *D. W. Dumble*, K.C., for the plaintiff. This currycomb art is one of small things. The question here is not of a corrugated comb simply, nor even only of the combination in regular order of teeth and corrugations. The patent of 1895 shews these characteristics. There is in it a regular arrangement of scallops and teeth. In it there are the same number of teeth and crimps in the space of, say, five inches. But in the patent of 1896 there are not the same number of teeth and corrugations in five inches, and the effect in currying is therefore different. The trial Judge, in finding that there was no "bevelling," was under a misapprehension as to what was meant by "bevelling." It is said that the plaintiff should have re-issued his patent of 1895. But the measure of right to re-issue is the disclosure in the first patent: Rules and Forms of the Canadian Patent Office, Rule 14; *Withrow v. Malcolm* (1882), 6 O.R. 12, at p. 41. There was no disclosure in the 1895 patent of the relative arrangement, as in the one of 1896, which is the very essence of the invention. No smallness or simplicity will prevent a patent being valid: *Riekmann v. Thierry* (1896), 14 Rep. Pat. Cas. 105. As to the contention that the failure to mark the patented articles with the words, "Patented 1896," as required by sec. 55 of the Patent Act, precludes the plaintiff's success in this action, the Patent Act itself, in sec. 64, provides the penalty for this. The only consequence of a breach of sec. 55 is the incurring of the penalty prescribed by sec. 64. The evidence proves the utility of the patent, and also that the provisions of sec. 38 of the Patent Act were complied with.

Lynch-Staunton, in reply.

November 15. The judgment of the Court was delivered by Moss, C.J.O. (after setting out the facts as above):—In dealing

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with the first class of objections it is to be borne in mind that, although the production of the patent and proof of the specifications were probably sufficient to cast upon the defendants the onus of establishing these defences (see sec. 34 of the Patent Act; *Amory v. Brown* (1869), L.R. 8 Eq. 663; *Harris v. Rothwell* (1887), 4 Rep. Pat. Cas. 225, at p. 229; *Young v. White* (1854), 23 L.J.N.S.Ch. 190, at p. 196; *Ward v. Hill* (1901), 18 Rep. Pat. Cas. 481), the plaintiff's case was not allowed to rest there. Evidence in support of the novelty and utility of the patented article and of the idea originating with Burke was adduced. Against this was evidence adduced by the defendants.

These issues were questions of fact to be determined by the learned trial Judge upon the whole evidence.

It is true that before an appellate Court the findings upon facts of a Judge of first instance are not conclusive; and they are no more conclusive in this case than in any other. The duty of examining the evidence and weighing the conclusions reached by the trial Judge upon it is not to be ignored by the appellate Court. But, in endeavouring to balance the testimony and to give the findings their proper value, it is important to remember upon which side lies the burden of proof. A man is not to be deprived of the benefit of his labour, skill, and ingenuity, and the results of the exercise of that faculty spoken of as invention, unless upon cogent and convincing proof either that what he has produced has not added anything useful or novel to previous knowledge of the subject, or that what he has patented was known to others before he patented it.

In the specifications attached to the plaintiff's patent it is stated that "the object of the invention is to devise a currycomb of the sheet metal class which will expeditiously and effectually cleanse horses and other animals, and it consists essentially of a currycomb in which the comb is formed from corrugated sheet metal with outwardly extending teeth forming portions of the corrugations and peculiarly formed in relation to each other, as hereinafter more particularly explained."

Figures are given and explained, and it is then pointed out that "the corrugated teeth are not formed with the top flush, as in the other combs of which I am aware, but are formed with outwardly extending serrated ends or teeth formed from the scallops, partially extending inwardly and partially extending outwardly."

The process by which this peculiar formation of the teeth is produced is then explained by reference to the figures, concluding with the following passage: "This is clearly shewn in figures 3 and 4, in which it will be clearly understood that it is essentially different from the flat corrugated toothed comb now in use."

The specification then goes on to describe the effect in use: "It will be seen in using the comb, the teeth being formed with portion bevelled outwardly from interior to exterior and portion from exterior to interior, and each tooth of the two differently bevelled sets having its highest point out of alignment to the adjacent tooth, that such teeth will form sort of plows and scrapers so to speak. The highest point of each tooth, however, when at the side of the corrugations serve to cut into the dirt so that it may be rapidly loosened by the portion of the teeth which serve to plow the dirt."

"It will also be seen that by the scallops forming teeth the dirt will not congregate in the interior of the comb and destroy its utility.

"The comb may be given the ordinary motion or a circular motion without injuriously affecting the skin or hair of the animal."

There is here set forth a description reading which any one, though without knowledge of the state of the trade of currycomb making, and unassisted even by an inspection of the comb—the finished article produced under the patent—would feel no difficulty in understanding what was aimed at, namely, a new arrangement of the face of a currycomb by so forming the edges of and correlating the teeth as to produce an effectual cleanser while doing away with some sources of irritation and possible injury to the animal's hide.

The claim is: "1. In combination in a currycomb, the back, the corrugated rings having their edges scalloped to form teeth, each tooth having its highest point out of alignment to the adjacent tooth as and for the purpose specified.

"2. In combination in a currycomb, the back, the corrugated rings having their edges scalloped to form teeth, portion of such teeth being bevelled outwardly from the interior to exterior and portion from exterior to interior, and each tooth of the two differently bevelled sets having its highest point out of alignment to the adjacent tooth as and for the purpose specified."

In each of these the claim of invention is substantially the same,

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the form given to the corrugated scalloped edged rings producing a set of teeth in which each tooth has its highest point out of alignment to the adjacent tooth, thus giving to the face of the comb a new property, and one which, according to the evidence, has proved of great utility in actual practice.

Perhaps no stronger testimonial to its usefulness could be offered than that given by Mr. Milne, the defendants' manager, a man of 40 years' experience in the manufacture and sale of currycombs, when, notwithstanding the disclaimer of the defendants' counsel, he frankly stated that he was not saying it was not useful, that if he did say so he was wrong, and that if they had not thought it was useful they would not have made it.

In *Lucas v. Miller* (1885), 2 Rep. Pat. Cas. 155, Kay, J., is reported as saying (p. 160): "As to the utility I have not heard much said; and if anything had been said I should have answered it, as I have intimated already, by saying that better evidence of the utility of an invention cannot possibly be had than the fact that the defendant has attempted to infringe it." See also Bowen, L.J., in *Miller v. Scarle* (1893), 10 Rep. Pat. Cas. 106, at p. 111.

Milne also said he found a considerable demand for it; the defendants' travellers wanted it and asked for it, and he got a sample of the plaintiff's patented article and started to make it.

While evidence of a large demand is not conclusive on the question of utility, it is cogent evidence not only of utility but also of novelty. In *Ehrlich v. Ihlee* (1888), 5 Rep. Pat. Cas. 198, Kekewich, J., said (p. 205): "If within a short time of the first manufacture and sale an article of commerce commands a ready and extensive sale, that fact, which is proof of utility, must also be accepted as evidence, not conclusive, but cogent, of novelty."

But the plaintiff does not rest merely on demand and sales as demonstrating novelty. Fetherstonhaugh, a patent solicitor and expert engaged in that class of work for twenty-eight years, and practising for himself for eighteen years, testified that he had had occasion to become familiar with the art and had seen and was aware, through reports of patents in the *Gazette* and examination of patents or of copies of patents, of the existence of a great number of patented currycombs and their descriptions, and that he was not aware of any comb prior to the plaintiff's with the distinctive feature of Burke's invention. This evidence would be sufficient

in itself, in the absence of any countervailing testimony: see *Galloway v. Bleaden* (1839), 1 Web. Pat. Cas. 521, at pp. 525-6. But, in addition to this, Burke's evidence shews that when he set himself to devise the comb he subsequently produced, and at the time when he finally evolved it, there was in use no comb embodying his idea. And, as the learned trial Judge has found, the evidence for the defence fails to controvert these statements.

The experts examined not only failed to shew that any of the combs made and in use before the plaintiff's contained the distinctive feature, but, when the essential differences were pointed out to them, virtually acknowledged their existence.

No patent or publication shewing a currycomb presenting a face similar to that presented by the plaintiff's, issued or published prior to the plaintiff's patent, was proved. And the evidence sustains the findings that the patent is for a new and useful invention, that it had not been anticipated, and that Burke was the true and first inventor thereof.

It was argued that there was, in fact, no invention, no inventive ingenuity exercised, that the thing was so simple as to be quite apparent to any person at all familiar with the use of currycombs.

This somewhat well-worn argument has been many times answered. In many instances simplicity, so far from being considered an objection, is deemed a merit, and where a device is new and useful very little invention suffices to support the patent: *Fulton on Patents*, 2nd ed., p. 47.

The next question arises upon the fact of the issue to Burke of the patent No. 49400, followed by a failure to keep it on foot. Did the description in the specification disclose the plaintiff's invention, and so make it public as to render ineffectual the issue to the plaintiff of patent No. 53318 as a protection against user by the public of the invention therein described?

It is common ground that Burke had completed his invention when he made the application on which patent No. 49400 issued, and that he intended to cover all that he had invented.

But, accepting the specification, drawings, and claim attached to patent No. 53318, as embodying the true description of Burke's invention, a comparison of them with the specification, drawings, and claim attached to patent No. 49400, makes it very clear that the latter do not cover the invention.

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The latter specification and claim make no reference whatever to the distinctive feature of the teeth out of alignment with one another, and the drawings do not suggest anything of that nature. The claim states: "I make no claim for the pressed back handle and corrugated rims, for I am aware that these are not new, but what I claim as my invention and desire to secure by patent is: the corrugated edges C on plain or corrugated metal rims of curry-combs, substantially as and for the purpose hereinbefore set forth."

For all that appears, what is claimed and sought to be secured by patent is nothing more than a comb formed by means of a plain or corrugated strip with edges scalloped after a fashion already known and used. It wholly failed to describe that which was the essence of the invention, the teeth out of alignment forming an entirely different edge and putting upon the comb a face new and differing from any theretofore produced. It may now be easy to say that a skilled workman reading the specification and looking at the drawings attached to patent No. 49400 could make the article Burke had intended to cover, and there is evidence to that effect.

But there is equally strong evidence to the contrary, and, in the conflict of opinion, it appears to commend itself more to one's understanding than the other. And the better conclusion is that at which the learned trial Judge arrived. It is true that the Chown Co. were making the article for Burke, but from a sample provided by him, and of course he could make it in the proper form, although he or the person acting for him in applying for the patent failed to describe that form.

There remain the questions as to the alleged failure to manufacture in these two years, under sec. 38 of the Patent Act, and as to effect of failure properly to mark the articles as required by sec. 55.

The evidence shews that shortly after obtaining the patent No. 49400, the W. W. Chown Company commenced to manufacture the comb substantially in the form really intended for the trade, and continued under Burke and the plaintiff to make it until 1903, and they continued to sell what they had manufactured until 1906. In that year, as the result of an action by the plaintiff against the Eclipse Manufacturing Co., that company took from the plaintiff a license to manufacture, and have since continued to manufacture the comb on a royalty paid to the plaintiff.

There seems, therefore, to have been no want of compliance with sec. 38.

As to the other objection, the learned trial Judge points out that the only consequence to the plaintiff of a breach of sec. 55 is a penalty imposed by sec. 69. There is no provision similar to that in the United States, that on any suit for infringement by the party so failing to mark no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement and continued after said notice to make, use, or vend the article so patented. But, even under that enactment, the failure to mark does not affect the right to an injunction, but only goes to the question of damages: *Goodyear v. Allyn* (1868), 3 Fish. Pat. Cas. 374.

Although it is unimportant in this case, it is a fact that the defendants were duly notified, and, after notice, and even after the commencement of the action, they made and sold the patented article. The damages awarded (\$20.80) are so trifling as to be of no real importance.

As to the allowance to the plaintiff of his costs, that, in the circumstances of this case, was a matter wholly within the discretion of the learned trial Judge. But, even if the matter were one proper for review, it must be borne in mind that throughout the defendants contested the plaintiff's right, and, as already mentioned, made sales after being notified of the infringement.

The appeal should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

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PRINGLE V. HUTSON.

Mortgage—Assignment—Re-assignment—Covenant for Payment—Right of Action—Ability to Give Release—Parties—Proviso for Re-payment—Rate of Interest post Diem—Costs.

In an action upon the covenant for payment in a mortgage made by the defendant to S., P. was originally the sole plaintiff, claiming as assignee of S., but, notice of the assignment being denied by the defence, an order was made in Chambers allowing S. to be added as co-plaintiff, and as thus constituted the action went to trial, where it appeared that the mortgage money had been advanced by two separate lenders, for whom S. was trustee, and that, by an earlier assignment than that under which P. at first claimed, the mortgage, the covenants therein, and the mortgage money, had been assigned to the *cestuis que trust*, to hold in proportion to their respective interests in the moneys secured, and that, by divers mesne assignments, etc., the mortgage and the covenants and the mortgaged property had, before action, been further assigned by the *cestuis que trust* to, and had become vested in, P. No notice of any of these assignments had been given to the defendant:—

Held, that the plaintiffs were entitled to maintain the action, and were in a position to give an effectual release, upon payment of the amount due.

Under the proviso for repayment the principal money was to be repaid on the 20th February, 1903; the interest at seven per cent. in half-yearly payments on the 20th days of February and August in every year; “and in the event of the said principal and interest or any part thereof remaining unpaid after any of the days above limited for payment thereof, then in every such case (the mortgage to be void) upon payment also of interest at the rate aforesaid upon all interest and principal so remaining unpaid from the day or days above limited for payment thereof till payment shall be made:”—

Held, that the plaintiffs were entitled to interest at the mortgage rate upon principal remaining due after the 20th February, 1893, and also upon any interest which was then due.

Imperial Trusts Co. v. New York Security and Trust Co. (1905), 10 O.L.R. 289, approved.

St. John v. Rykert (1884), 10 S.C.R. 278, and like cases, distinguished.

Held, also, that there was no good reason why the defendant should not pay the costs of the action.

Judgment of MEREDITH, C.J.C.P., affirmed.

APPEAL by the defendant from the judgment of MEREDITH, C.J.C.P., at the trial, in favour of the plaintiffs, for the recovery of \$3,395.98 and costs.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

This is an action brought to recover the amount due upon a covenant contained in a mortgage made by the defendant to the plaintiff Smith to secure an advance of \$1,777.

Although made to a single mortgagee, and there is nothing on its face indicating it, the mortgage is in fact a contributory mortgage

in which the funds of two separate trust estates are mingled; an objectionable feature which has led to most of the difficulties which the plaintiffs have encountered in their endeavours to recover the amount due on the mortgage.

For the purpose of attributing to the persons entitled to participate in the invested funds their proper shares and separating their interests therein, and for other reasons, numerous instruments have been executed, total assignments, partial assignments, confirmatory assignments, and reassignments, with the result that the defendant has been able to present a number of objections none of which go to the merits of the claim.

It is beyond dispute that the defendant received the moneys to secure repayment of which the mortgage was given, and that they have not been repaid save as to a comparatively small amount, and there is no defence to the claim in the action, provided it is being maintained by a person or persons entitled to the benefit of and to enforce the covenant.

The action, as launched, was by the plaintiff Pringle as sole plaintiff, alleging himself to be the assignee of the mortgage and claiming payment of the amount due.

By way of defence the defendant set up that the plaintiff was not entitled to sue, that the action was premature, that the plaintiff had no interest in the moneys sought to be recovered, and that the action was champertous; that Smith, the mortgagee, had, previously to assigning to the plaintiff, assigned to others the right to receive the mortgage moneys, and could not assign to the plaintiff; that in any case the plaintiff was only entitled to recover a portion of the moneys; and that no moneys were advanced.

Subsequently, as the result of some proceedings before the Master in Chambers, an order was made allowing the plaintiff to amend the writ of summons by adding Smith as a co-plaintiff in the action as from the date of his being added. This was done, and, the pleadings having been also amended, the case came on for trial before Meredith, C.J., who gave judgment against the defendant for \$3,395.98 and costs.

The appeal was heard on the 5th October, 1909, before Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

A. J. Russell Snow, K.C., for the defendant. The plaintiff

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Pringle is not entitled to maintain this action, not having first given express notice in writing of the assignment of the covenant under which the action is brought, as required by R.S.O. 1897, ch. 51, sec. 58, sub-sec. 5: *McMillan v. Orillia Export Lumber Co.* (1903), 6 O.L.R. 126. The debt and the covenant are indivisible, and the party suing must be one in whom they are vested and who can give a valid discharge. That is not the case here, as the debt which the defendant covenanted to pay to one person has been severed and apportioned by various assignments between several persons, with whom the defendant had no contract whatever, and no one of whom can give an accurate account of what is due on the mortgage. The plaintiffs are not entitled to recover interest at seven per cent. after the maturity of the mortgage. The defendant is entitled to credit for more than allowed him by the trial Judge. The plaintiffs are at all events not entitled to costs.

F. Arnoldi, K.C., for the plaintiffs, contended that the plaintiff Pringle had shewn a complete equitable title; Smith, the holder of the legal title, was before the Court; and all discrepancies in the account were explained at the trial.

Snow, in reply, referred to *Imperial Trusts Co. v. New York Security and Trust Co.* (1905), 10 O.L.R. 289.

November 15. Moss, C.J.O. (after setting out the facts as above):—The chief objections to the judgment urged on the appeal were the want of status of the plaintiffs, and—assuming the right to recover—the allowance to the plaintiffs of interest at seven per cent., the rate stipulated for in the mortgage, upon the principal remaining unpaid after the day fixed for payment, the failure to give certain credits, and the allowance of costs to the plaintiffs.

The first objection depends upon the effect of the various instruments already referred to. When the purposes for which these were executed are understood, the matter becomes comparatively simple.

No conflict of claimants for the mortgage moneys is in question here. Indeed, all beneficially entitled agreed to unite and have united in seeking to put the matter in such shape as to enable the mortgage moneys to be recovered. And a careful tracing of the various steps taken to that end shews that before the case came to trial the plaintiffs or one of them had the right to recover on the

covenant. As the defendant had no notice of any of the assignments before the action was commenced by Pringle as sole plaintiff, he was right in his position that the action as launched was wrongly constituted. But, if the defendant had been notified of the assignment by Smith to Pringle of the 27th August, 1908, and of that alone, Pringle could have properly maintained the action. If there had been no other assignment and no notice of it, there could be no objection to an action by Pringle and Smith, the latter suing for the former's benefit and admitting his right to receive the moneys due under the covenant. No doubt, if Smith desired to sue alone, it would have been necessary to have obtained a re-assignment from Pringle and given notice thereof to the defendant—as suggested by Chitty, L.J., in *Durham Brothers v. Robertson* (1898), 78 L.T.R. 438. But, when both sue, all necessity for that is done away with. Virtually this situation had been reached, with the sanction of all parties beneficially entitled, when the trial took place.

Between them the plaintiffs represent both the legal and the equitable title to the moneys advanced to the defendant and the covenant given to secure repayment. It was said that, although the fact that the defendant had not been notified of the assignment to Pringle before the commencement of the action disentitled Pringle to sue, yet that the action was notice to the defendant, and so Smith was not a proper party plaintiff. But, having been joined, it is no answer to the claim that he need not have been joined. At most it is a matter of costs, and they are dealt with in the order permitting the joinder, which of course stands in the absence of any appeal at the proper time.

It was urged that, if the defendant was compelled to pay, the plaintiffs were not the persons who could make a proper reconveyance of the mortgaged premises. It was not pointed out in what respect there was any defect in the title of the plaintiffs to the lands. Whatever difficulty there might have been in regard to passing the right to sue upon the covenant, there was no difficulty in conveying the mortgaged estate.

But the defendant does not come seeking to redeem, submitting to pay the mortgage, and asking for a reconveyance, and no question as to it arises until the defendant pays the judgment or is ready to pay it. Then, if he sees any real difficulty, he can avail himself

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of the right to apply in the action, which by Con. Rule 622 is reserved to any party.

As to the allowance of interest at the rate of seven per cent. after the default in payment of the principal, the undertaking with regard to interest is much wider and more extensive than was the case in the well-known cases of *St. John v. Rykert* (1884), 10 S.C.R. 278; *Powell v. Peck* (1888), 15 A.R. 138; and *People's Loan and Deposit Co. v. Grant* (1890), 18 S.C.R. 262.

Under the proviso for repayment the principal money was to be repaid on the 20th February, 1893, the interest at seven per cent. in half-yearly payments on the 20th days of February and August in every year. It then proceeds: "And in the event of the said principal and interest or any part thereof remaining unpaid after any of the days above limited for payment thereof, then in every such case upon payment also of interest at the rate aforesaid upon all interest and principal so remaining unpaid from the day or days above limited for payment thereof till payment shall be made."

Here there is what was absent in the cases referred to, a stipulation as to payment of interest on overdue principal at the mortgage rate. And the covenant for repayment, though in the statutory language, covers the words of the proviso.

No allowance was made to the plaintiffs for interest on overdue interest with periodical rests, and as regards the principal the language of the proviso, though not the same, is equal in effect to that in the mortgage in the case of *Imperial Trusts Co. v. New York Security and Trust Co.*, 10 O.L.R. 289, which was conceded to be sufficient to entitle the plaintiffs to interest on overdue principal. No rests were made except when credits were given. The computation, as shewn by the statement exhibit 8, seems to have been made on the proper footing.

As to the non-allowance of credits, this appears to be founded on accounts laid before the Surrogate Court; and, as explained, they do not appear to shew payments or allowances of which the defendant is entitled to the benefit beyond those with which he is credited in the statement (exhibit 8) of the computation of the amount due to the plaintiffs.

As to the award of costs against the defendant. The action was properly constituted at the time of, if not before, the trial.

And the costs relating to the addition of Smith as a co-plaintiff were dealt with by the Master in Chambers. The defendant did not then submit to pay, but contested the action throughout, and, having failed, there appears no good reason why he should not bear the costs.

The appeal should be dismissed with costs.

OSLER, J.A.:—As this action was originally brought, the plaintiff Pringle was sole plaintiff, claiming as assignee of Smith, the mortgagee, but, notice of the assignment being denied by the defence, an order was made in Chambers allowing the mortgagee to be added as co-plaintiff, and as thus constituted the action went to trial. There it appeared that the mortgage money had been advanced by two separate lenders, for whom the mortgagee was trustee, and that, by an earlier assignment than that under which the plaintiff Pringle at first claimed, the mortgage, the covenants therein, and the mortgage money, had been assigned to the *cestuis que trust* or their representatives, to hold in proportion to their respective interests in the moneys secured, and that, by divers mesne assignments and conveyances and appointments of new trustees, the mortgage and the covenants and the mortgaged property had, before action, been further assigned by the *cestuis que trust* to, and had become vested in, the plaintiff Pringle. No notice of any of these assignments had been given to the defendant.

Under these circumstances, it appears to me clear that the legal right to maintain an action remained in the plaintiff Smith, the original mortgagee, in whom and the plaintiff Pringle between them the whole legal and equitable title to the mortgage and the moneys secured thereby was vested. I do not see how the earlier assignment to the *cestuis que trust* defeated the right of action on the covenant or the right of those assignees or those claiming under them to sue thereon in Smith's name, when no notice had been given to the debtor. If the covenant could not legally be divided, it has not been divided, and the original covenantee must be entitled to sue as trustee for the parties beneficially interested in the mortgage money, as he does here. *Scarlett v. Nattress* (1896), 23 A.R. 297, may be referred to.

As to the plaintiffs' right to recover interest at seven per cent.

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upon overdue principal and upon any arrears of interest which were due on the 20th February, 1893, the language of the covenant seems reasonably plain. The principal was to become due on the 20th February, 1893; interest meantime half-yearly on the 20th February and 20th August, at seven per cent.; "and in the event of the said principal and interest or any part thereof remaining unpaid after any of the days above limited for payment thereof, then in every such case (the mortgage to be void) upon payment also of interest at the rate aforesaid upon all interest and principal so remaining unpaid from the day or days above limited for payment thereof till payment shall be made." I do not see how the right to interest at the mortgage rate upon principal remaining due after the 20th February, 1893, and also upon any interest which was then due, though not upon subsequent interest, could be more clearly expressed. See *Imperial Trusts Co. v. New York Security and Trust Co.*, 10 O.L.R. 289. But authorities are needless when the language is plain.

MEREDITH, J.A.:—The appellant is unquestionably liable, upon his covenant, to pay the mortgage moneys and interest in question: his struggle has been, by more or less technical objections, to put off the long-delayed evil day of payment: but that day has come; the plaintiffs are in a position now to give an effectual release; indeed, there never would have been any difficulty in that respect had the appellant been willing and ready to pay: a valid release the appellant is, of course, entitled to upon payment being made.

The costs were subject to the discretion of the trial Judge; and, he having duly exercised that discretion, they are not the subject of an appeal: though I may say that, having regard to things substantial rather than technicalities, there does not seem to me to be any very good reason why they should not have been awarded as they were.

The appeal on the question of interest was, I understood, abandoned upon the argument.

GARROW and MACLAREN, JJ.A., concurred.

Appeal dismissed with costs.

[IN THE COURT OF APPEAL.]

RODD V. COUNTY OF ESSEX.

C. A.

1909

Nov. 15.

Municipal Corporations—County of Essex—Office of Clerk of the Peace and Crown Attorney—Place for—Duty of County Council.

AN action by the Clerk of the Peace and Crown Attorney of the county of Essex for a declaration that the proper place for his office is the city of Windsor in that county, notwithstanding that the town of Sandwich is the county town, and for a mandamus to compel the county council to provide a proper office for him in Windsor, was dismissed, the Court having no power to declare that an office shall be established or arrangements made for it in Windsor, simply because the tide of business life has flowed away from Sandwich, where the county buildings are, in which as in other counties this and other offices are provided for.
Judgment of FALCONBRIDGE, C.J.K.B., reversed.

AN appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial in favour of the plaintiff.

The following statement of the facts is taken from the judgment of OSLER, J.A.:—

This is an action by the plaintiff, who is the Clerk of the Peace and Crown Attorney of the county of Essex, claiming a declaration that the proper place for his office is the city of Windsor, in that county, notwithstanding that the town of Sandwich is the county town, and for a mandamus to compel the corporation to provide a proper office for him there.

The learned trial Judge decreed in the terms of the claim, with \$150 damages, equivalent to a share of the rent paid by the plaintiff for his office in Windsor since the defendants' refusal to provide one for him there.

It appeared from the evidence that up to the 31st March, 1908, the plaintiff and all his predecessors in office had, for the convenience of the public and the more easy performance of their duties, always occupied an office in Windsor; the town of Sandwich, though the county town, being a comparatively small place, and the great bulk of the work of the office being done in Windsor, which, whether as village, town, or city, from its position on the river, its proximity to Detroit, and its accessibility from all parts of the county, had always been a place of much greater importance.

There does not appear to have been any statutory or departmental authority or permission to the holders of the office to maintain a local habitation for it in Windsor, which is, no doubt, for

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many reasons, the most convenient place for it, although some of the duties pertaining to the office are necessarily performed at the county town.

In March, 1908, the defendants refused to pay any longer part of the rent of the plaintiff's law office in Windsor, and notified him that the necessary office would be provided for him at the court house, Sandwich. The office, or room, afterwards furnished there, was shewn to be entirely inadequate and unsuitable.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 7th October, 1909.

A. H. Clarke, K.C., for the defendants. The duty of the defendants as to providing proper accommodation for their County Attorney and Clerk of the Peace is prescribed by the Consolidated Municipal Act, 1903, sec. 506 (1), an enactment similar to that which has been interpreted by the Court in the case of *Lees v. County of Carleton* (1873), 33 U.C.R. 409, but there is nothing either in the statute or in that case which supports the plaintiff's contention. The County Courts Act, R.S.O. 1897, ch. 55, sec. 7, provides that the Clerk of the County Court of the county of Essex may keep an office in the city of Windsor, subject to certain conditions, but this provision does not affect the point at issue, and the same may be said of the similar provisions as to the office of the Deputy Clerk of the Crown and Pleas, contained in the Judicature Act, sec. 156 (2), and the office of the Registrar of the Surrogate Court, in the Surrogate Courts Act, sec. 13 (2). The General Sessions Act, R.S.O. 1897, ch. 56, and the County Crown Attorneys Act, R.S.O. 1897, ch. 96, are silent as to the place in which the officials holding the positions now in question are to have their offices. It follows that the defendants are not compellable to provide an office for the plaintiff at any other place than in the county town, and, as he has refused to occupy any office there, he is not entitled to damages by reason of the alleged unsuitability of the office furnished.

E. S. Wigle, for the plaintiff, argued that it was impossible for the defendants to discharge their statutory obligation to provide proper office accommodation for the plaintiff at any other place than in the city of Windsor, where all roads met, where the police magistrate held his court, at which the plaintiff's attendance was

required every day, and where nearly all the criminal business of the county had to be transacted. The office which the defendants proposed to provide for the plaintiff at the county town was altogether unsuitable for the purpose.

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November 15. OSLER, J.A.:—The duty of the county council is prescribed by sec. 506 (1) of the Consolidated Municipal Act, 1903, by which they are bound, subject to certain exceptions, to provide proper offices, together with fuel, light, stationery, and furniture, for all offices connected with the Courts of Justice. The Crown Attorney is an officer, within the meaning of this section, for whom the county council is bound to provide offices and accommodation: *Lees v. County of Carleton*, 33 U.C.R. 409. Nothing in the section expressly says where the offices are to be provided, and the Crown Attorneys Act is equally silent on the subject. The court house must be in the county town, and the Courts are held and housed there, and offices and rooms connected with the court house are spoken of as offices of which the county council is to have the care.

It may appear from sec. 10 of the Jurors' Act, 9 Edw. VII. ch. 34 (R.S.O. ch. 61, sec. 13), that the office of the Clerk of the Peace is not necessarily in the court house, but may be elsewhere in the county town, and it must be manifest to every one that in ordinary circumstances the county town, and *primâ facie* the court house there, is the natural and reasonable seat for all offices connected with the Courts and the administration of justice, other than Division Courts, considering the duties which the holders of such offices have to perform.

I see no authority for saying that the Crown Attorney or any other officer connected with the Courts of Justice can compel the county council to provide offices in Windsor. Any inference to be drawn from legislation is opposed to such a contention. The Clerk of the County Court, the Deputy Clerk of the Crown, and the Registrar of the Surrogate Court, in each county, is required by law to keep, or hold, his office in the court house or at some convenient place in the county town, but in the case of the county of Essex it is further provided that, subject to such arrangements as the county council assent to and to the approval of the Lieutenant-Governor in council, each of the before-mentioned

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officers may keep "an" office at some convenient place in the city of Windsor: R.S.O. 1897, ch. 51, sec. 156; ch. 55, sec. 7; and ch. 59, sec. 13 (1). There is no such provision in the case of the Crown Attorney; and, though there is also no positive requirement that the office shall be kept in the court house or in the county town, the only consequence is that, in the absence of authority to the county council to acquire property in the city of Windsor, or to assent to arrangements by the holder of the office to maintain or keep "an" office there, the control rests in the discretion of the council, who may provide the proper office in the court house, the natural place for it under ordinary conditions—and the Legislature has not, in the case of this particular office, contemplated extraordinary ones—or elsewhere in the county town. I do not see what power the Courts have to declare that the office shall be established or arrangements made for it in Windsor, simply because the tide of business life has flowed away from Sandwich, where the county buildings are and in which in other counties this and other offices are provided for. If in this respect the discretion of the council is to be subject to control, it is matter for legislation, not for the Courts.

Whether or not the county council has power to acquire land or property for an office in the city of Windsor is a question not now necessary to be considered.

The appeal must be allowed.

MEREDITH, J.A.:—It is not denied by the defendants that it is the duty of their council to provide "proper offices, together with fuel, light, stationery, and furniture," for the plaintiff, as Clerk of the Peace and County Crown Attorney for the county: see the Consolidated Municipal Act, 1903, sec. 506: the single question raised, and argued, upon this appeal, is, whether it is sufficient to provide such offices in the court house at the county town.

For the plaintiff it is said, and was proved, that the county town is by no means the most convenient place in the county for such offices, but that is not the question. The question is whether the court house is a proper place; and it is obvious that it is, if indeed it may not be said that it is ordinarily the only proper place, for the office of the Clerk of the Peace, if not also of that of the County Crown Attorney.

The plaintiff's contention really amounts to this, that the county town ought to be changed, so that the court house, and all its offices, would be in a more convenient place; but the Courts have no power to change the county town, nor to provide the means necessary for the erection of a new court house; the problem must be solved elsewhere.

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I would allow the appeal, and dismiss the action.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

Appeal allowed with costs and action dismissed with costs.

[IN THE COURT OF APPEAL]

CANADIAN PACIFIC R.W. CO. v. CITY OF TORONTO.

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GRAND TRUNK R.W. CO. v. CITY OF TORONTO.

1909

Appeal to Privy Council—Application to Allow Security—Jurisdiction—Matter in Controversy—R.S.O. 1897, ch. 48, sec. 1.

Nov. 22.

Where the sole question in two actions was as to the validity of an order of the Railway Committee of the Privy Council of Canada requiring the plaintiffs to build a bridge:—

Held, refusing an application to allow the security upon a proposed appeal to His Majesty in His Privy Council from the decision of the Court of Appeal, that an appeal did not lie as of right under R.S.O. 1897, ch. 48, sec. 1; MEREDITH, J.A., dissenting upon the ground that the subject of the controversy was, in substance, the bridge, the cost of building which would far exceed the statutory limit of \$4,000.

Toussignant v. County of Nicolet (1902), 32 S.C.R. 353, and *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310, followed.

MOTION by the plaintiffs for the allowance of the security upon a proposed appeal to His Majesty in His Privy Council from the judgment of the Court of Appeal, 10 O.W.R. 483, affirming the judgment of ANGLIN, J., 6 O.W.R. 852, dismissing the actions, which were brought to obtain a declaration that an order of the Railway Committee of the Privy Council of Canada, dated the 14th January, 1904, and an order of the Governor-General in council, dated the 7th October, 1904, approving thereof, with a variation as to the dates fixed for compliance therewith, were made without jurisdiction and were invalid. The order of the Railway Committee

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required the plaintiffs, at their joint expense, to construct a bridge over their tracks crossing Yonge street in the city of Toronto.

The motion was heard on the 20th September, 1909, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. D. Armour, K.C., for the plaintiffs the Canadian Pacific Railway Company. The defendants contend that the case does not come within R.S.O. 1897, ch. 48, sec. 1,* alleging that the "matter in controversy" does not involve the payment of any sum, and that therefore an appeal does not lie, but this view is erroneous, as the judgment sought to be appealed from imposes an obligation under which the plaintiffs will have to expend a sum exceeding \$200,000, and the order of the Committee, under sec. 46 of the Railway Act, is equivalent to a judgment of the Court unless and until set aside. [Moss, C.J.O.:—How do you distinguish this case from *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310?] That case is distinguishable, as there the city could not acquire or dispose of the franchise which was in question, and could do no more than give the right to occupy the streets. Here there is a money obligation which the city could enforce by sequestration or fine. The phrase "the matter in controversy" has a wider scope than the mere payment of a specific amount. I refer to *Gillett v. Lumsden*, [1905] A.C. 601; *Macfarlane v. Leclaire* (1862), 15 Moo. P.C. 181, at p. 187; *Falkners Gold Mining Co. v. McKinnery*, [1901] A.C. 581; *Noakes v. Noakes and Co.* (1906), 23 Times L.R. 16.

R. C. H. Cassels, for the plaintiffs the Grand Trunk Railway Company. The matter in question relates to the taking of an "annual" rent or fee within the meaning of sec. 1 of ch. 48, as the railway companies would, under the order, be compelled to pay a large annual sum for the maintenance of the bridge.

W. C. Chisholm, K.C., for the defendants, contended that the point at issue was concluded by authority, citing *Toussignant v. County of Nicolet* (1902), 32 S.C.R. 353, *per* Taschereau, J., at p. 354. That case was decided under what is now sec. 46 of the Supreme Court Act, R.S.C. 1906, ch. 139, in which the same expression in

* Where the matter in controversy in any case exceeds the sum or value of \$4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to Her Majesty in Her Privy Council.

effect is used as in the Ontario Act, the only difference being that the Ontario Act says "exceeds" a certain amount, whereas the Dominion statute says "amounts to" a certain sum. In that case it was held that the "probative force of a judgment" is not to be taken into account where a specific sum is mentioned. The viaduct order made last June practically supersedes the order now sought to be appealed from, so that it is unnecessary to proceed with the present appeal. The case of *City of Toronto v. Toronto Electric Light Co.*, above cited, was not so strong a case in favour of the defendants' contention as the present one, as there the validity of the franchise was in question. *Abadie v. United States* (1893), 149 U.S. 261, was also referred to.

Armour, in reply. The plaintiffs are willing to agree that the order now in question has been superseded by the viaduct order, if the defendants will bind themselves to agree to that disposition of the case. The same question of jurisdiction arises in both cases, and it can be conveniently disposed of in this case.

November 22. OSLER, J.A.:—It appears to me that in this case an appeal does not lie as of right under R.S.O. 1897, ch. 48, from the decision of this Court to His Majesty in His Privy Council. The controversy is not as to a pecuniary amount or of a pecuniary nature. It is simply as to the validity of an order of the Railway Committee. If it were a matter involving directly the value of property affected by the adjudication in the action, that value might be shewn by affidavit, as pointed out in *Falkners Gold Mining Co. v. McKinnery*, [1901] A.C. 581. This is an action of a very different nature, and the decision of the Supreme Court of Canada in *Toussignant v. County of Nicolet*, 32 S.C.R. 353, though not binding upon us on an application like the present, proceeds upon reasoning quite applicable to our Act above cited. I refer also to *Gillett v. Lumsden*, [1905] A.C. 601, and to *City of Toronto v. Toronto Electric Light Co.*, 11 O.L.R. 310 (C.A.), which is really decisive of the question before us.

The appellants must be left to apply for leave to appeal, and their application for the allowance of security refused.

MOSS, C.J.O., GARRÓW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The applicants have been ordered

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to erect a bridge, which will cost them tens, if not hundreds, of thousands of dollars. They are desirous of appealing against that order, with the object of relieving themselves, altogether, from its obligations: and yet it is said that the value of the "matter in controversy" does not exceed \$4,000. In that I find it impossible, in any way, to agree.

I cannot but think that the Legislature meant the substantial matter; and surely the substance of the controversy is the bridge: what else can it be? The Legislature meant to give leave to appeal in cases of importance; of the importance of anything exceeding \$4,000, in money or in value.

Their words being ample, in their ordinary sense, to include such a case as this, I decline to cut them down so as to cause the absurd effect of denying a right of appeal in such an important case as this, though giving that right in cases of comparative insignificance in all respects: to attribute to the Legislature such inconsistency, or short-sightedness, without any excuse of any stumbling block in the literal meaning of the words employed to convey its meaning.

The subject generally has been so much dealt with in such cases as *City of Toronto v. Toronto Electric Light Co.*, 11 O.L.R. 310, *Lovell v. Lovell* (1907), 13 O.L.R. 587, and *Irving v. Grimsby Park Co.* (1909), 18 O.L.R. 114, that it would be inexcusable to now waste time in a repetition of the views expressed in them.

Even in the Supreme Court of Canada, to which we are accustomed to look as having taken, very generally, the narrower view of statutes conferring jurisdiction upon it, we find that, ultimately, the very satisfactory—if I may say so—rule, expressed in the following words, has generally been adopted: "It is not necessary that the amount in controversy should be a sum of money. The statute was intended to cover the value of the thing demanded, the object being to give this Court jurisdiction to hear and decide appeals in cases where the issues involved a consideration of sufficient value to justify the appeal:" see *Côté v. James Richardson Co.* (1906), 38 S.C.R. 41, 49, and *Robinson Little & Co. v. Scott & Son* (1907), 38 S.C.R. 490.

The *Gillett* case—[1905] A.C. 601—seems to me to indicate that, in this case, it is the duty of this Court to determine the value of the real matter in controversy—the cost to which the order in question puts the applicants—and that, if that exceed \$4,000, it is

bound to allow the security, if sufficient. Here the amount so involved, admittedly, vastly exceeds that sum. To the same effect seems to me to be the case of *Simmons v. Mitchell* (1880), 6 App. Cas. 156.

It is to be hoped that the question will be set at rest in some such way as was adopted in the case of *Mohideen Hadjiar v. Pitchey*, [1893] A.C. 193; for, if such an anomaly exist as no right of appeal in such a case as this, though it is given in comparatively insignificant cases, it may, indeed it must, be time to remove it.

I desire to add an acknowledgment of consciousness that I, in common with all other persons residing, whether temporarily or permanently, in Toronto, have, more or less, an indirect, if not direct, interest in the subject matter of this litigation—the bridge; and that that fact is also an incentive to the hope that all questions involved in such litigation may be finally considered by a higher tribunal.

[DIVISIONAL COURT.]

STEWART V. COBALT CURLING AND SKATING ASSOCIATION.

Negligence—Breaking of Railing of Spectators' Gallery in Hockey Rink—Injury to Spectator—Liability of Owners—Insufficient Strength of Railing—Employment of Competent Architect.

The defendants, the owners of a rink, were held liable in damages for negligence in respect of injuries sustained by the plaintiff, who paid for a seat in the rink to see a hockey match, and who was injured by reason of the breaking of the railing of the gallery, above the ice, in which he was seated—the railing not being so constructed as to resist the outward pressure of the spectators leaning forward to see what was going on below, which was to be expected and should have been guarded against. The defendants were not absolved because they had employed a competent architect.

Francis v. Cockrell (1870), L.R. 5 Q.B. 501, and *Duncan v. Perthshire Cricket Club* (1904), 42 Sc. L.R. 327, followed.
Judgment of RIDDELL, J., affirmed.

ACTION for damages for personal injuries sustained by the plaintiff owing to the negligence of the defendants, as alleged. The facts are stated in the judgments.

The action was tried by RIDDELL, J., without a jury at Sudbury, on the 27th April, 1909.

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A. G. Slaght, for the plaintiff.*H. E. Rose*, K.C., and *G. Mitchell*, for the defendants.

STEWART

v.

COBALT
CURLING
AND
SKATING
ASSOCIATION.

Riddell, J.

June 8. RIDDELL, J.:—The defendants, desiring to erect a curling, skating and hockey rink, employed an architect, Graham, of some local reputation and considerable experience. They trusted to him entirely, and did not in any way interfere in the erection of the rink—the architect had full charge of the building, which was erected according to his specifications and instructions.

Around the arena—if it be proper to speak of arena when the surface is of ice and not of sand—there were galleries about ten feet high above the ice, sloping upward and backward, and fitted with seats. A railing, fastened by nails to upright pillars, ran along the front of these galleries—the railing was utterly insufficient to prevent what afterwards happened, though quite strong enough to resist any pressure directly downward.

The plaintiff paid for a seat in one of the galleries at the “rooters” end—“rooters,” as I understand it, being those spectators who are most enthusiastic—to witness a hockey match. A fight or other disturbance took place close by the edge of the ice immediately adjacent to this gallery. People in front leaned over the railing to see, and those behind pressed forward and leaned over them. The railing broke, and the plaintiff, who had been in front, was with others thrown down upon the ice and rather seriously injured.

The match seems to have been an exciting one and one which had been expected to be exciting.

At the trial Graham seemed to think that a railing such as this is erected simply to resist vertical pressure. I am of the opinion that what happened was precisely what the defendants should have expected to happen. The rush of the people was wholly natural, and they could not be expected to keep away from the railing; and that any but a strong railing would break under such circumstances needs no knowledge of mechanics or architecture to know. The most casual inspection would have shewn the utter insufficiency of the railing.

The case is wholly covered by the case in the Exchequer Chamber of *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501. The head-note reads: “A man, who causes a building to be erected for viewing a public exhibition and admits persons on payment of money to

a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose; . . . although" he "was personally free from negligence, and had employed a competent person to erect the stand." Kelly, C.B., says (p. 504): "What the defendant in a case like this contracted for was, that the stand upon which he supplied a seat to the plaintiff for the pecuniary consideration . . . should be reasonably fit for the purpose for which it was supplied to him, without any other exception or qualification than . . . that the defendant did not contract against any unseen and unknown defect which there was no means of discovering or ascertaining under ordinary and reasonable modes of inquiry or examination." At p. 508: "One who lets for hire . . . any article or thing, whether it be . . . a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant . . . that the article or thing is reasonably fit for the purpose to which it is to be applied . . ."

It is true that in that case the stand itself gave way; but the principles are laid down with sufficient clearness.

Here it was necessary for the plaintiff to lean over the railing to see the game when the puck was near his gallery—it was to be expected that there would be a rush to the front of those behind if any row took place, and a row might be expected to take place. It seems to me that the warranty of the defendants went so far as to warrant the sufficiency of the railing to withstand what was or might be expected to happen.

It seems to me that it is perfectly idle for the architect to say that he did not expect any such occurrence. Had he thought about the matter at all, he must have known that such an occurrence was not only likely but almost certain, and the same remark applies to the defendants.

The case of *Valiquette v. Fraser*, in our own Courts (1904-7), 9 O.L.R. 57, 12 O.L.R. 4, 39 S.C.R. 1, is different; and I do not think it necessary to refer to the cases in which *Francis v. Cockrell* is considered. No case has overruled that case, nor cut into its principles, though many cases are found in which it is cited. See *Talbot & Fort, Kant, and Beven on Negligence*.

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The damages are substantial, and I assess them at \$850.

The plaintiff is entitled to his costs.

STEWART

v.

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AND

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ASSOCIATION.

The defendants appealed from the judgment of RIDDELL, J., and their appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ., on the 11th November, 1909.

H. E. Rose, K.C., for the defendants. The railing which gave way was strong enough for all purposes which could reasonably be in the contemplation of the defendants. They employed a competent and experienced architect, who could not be expected to construct a railing that would resist such an unusual lateral pressure as was caused by the rushing forward of the spectators in rear to the front part of the gallery. The case of *Francis v. Cockrell*, L.R. 5 Q.B. 184, affirmed *ib.* 501, is distinguishable, as there the stand gave way from vertical pressure. I rely on the recent case of *McCallum v. North British R.W. Co.* (1908), 45 Sc.L.R. 305, where the defendants were absolved from negligence in respect of an accident occasioned by an unusual crowd of passengers, a state of facts very similar to that now in question. *Valiquette v. Fraser*, 39 S.C.R. 1, affirming the judgments in 12 O.L.R. 4 and 9 O.L.R. 57, may also be referred to, especially the judgment of Street, J., 9 O.L.R. at pp. 61-63.

W. M. Douglas, K.C., for the plaintiff. The trial Judge was right in following *Francis v. Cockrell*, the principle of which is undoubtedly sound and has never been questioned. It has been found as a fact that what happened was only what was to be expected, and that the defendants and their architect should have known that such was the case. *Francis v. Cockrell* applies to just such a state of facts, and the circumstance that in that case the stand gave way and not merely the railing, does not affect the principle.

November 23. The judgment of the Court was delivered by BOYD, C.:—There is plenty of evidence to uphold the conclusion of fact that the front rail in the gallery of the rink was not constructed so as to resist the pressure that might be expected to be brought upon it. The architect who superintended the construction admits that he never figured out what weight of outward

pressure the rail would have to resist. On the night of the hockey contest the rail on this part of the gallery was subject to greater pressure than in other parts of the building, and, while the others resisted, this one broke in the middle, and some twenty people fell twelve feet to the ice rink below. It so happened that a scuffle arose among the players just below this place, and those on the front seat leaned over to see, and those in the seats behind came forward or leaned forward also to see, so the outward thrust broke the two by four-inch piece of pine into splinters. At this gallery was a place which needed special protection, as it was intended for "rush seats," where the "rooters" sit, forming the most excitable and enthusiastic part of the spectators. On that night that part of the gallery was crowded to its utmost capacity, and a corresponding increase of revenue secured to the proprietors. It is to be expected that when any quarrel or ruction arises during the game the people will look over the rail and press forward to the rail to see what is going on below, and this rail was not constructed with a view to withstanding any outward thrust whatever. It was not braced at intervals between the twelve-foot length, and it would seem to be a somewhat flimsy structure at best. Several witnesses so speak of it in relation to lateral pressure. It was far from being absolutely safe; it was not even reasonably safe, considering what might be expected during exciting matches with an enthusiastic crowd of onlookers.

Francis v. Cockrell, L.R. 5 Q.B. 184 and 501, is the leading case. It is discussed by Sir F. Pollock in the last edition of his work on Torts, 8th ed., p. 508, and it is pointed out that the obligation resting upon the owner of a building to which the public is invited is different from the ordinary law of negligence. The structure must be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so. Sir F. Pollock's view has judicial sanction in the judgment of Bigham, J., in *Marney v. Scott*, [1899] 1 Q.B. 986, 992. As put by Willes, J., in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, 288: "The visitor . . . is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." I think a correct exposition is given of the modern doctrine by Lord Stormonth Darling in *Duncan v. Perthshire Cricket Club* (1904), 42 Sc. L.R. 327. He quotes in part from an earlier

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case, but this is the language I refer to: "Here the building was new and erected for a special purpose, and the duty of the defenders was to see that it was safe. How they chose to discharge that duty, whether and by what form of inspection, it was for themselves to decide. The pursuer was not bound to say more than . . . that 'the defects in the said stand which caused its collapse were manifest to any person inspecting the same with reasonable care, as it was the duty of the defenders to do.' If that statement be true, then it does not matter to the defenders' liability whether they relied on a careless inspection or made no inspection at all." The leading case decides also that the defendant is not absolved from liability though he is personally free from negligence and has employed competent builders and designers: *Valiquette v. Fraser*, 39 S.C.R. 1.

The case cited for the defendants of *McCallum v. North British R.W. Co.*, 45 Sc.L.R. 305, is put on the ground of no negligence by the railway company in not handling a crowd, because there was no reason to anticipate that there would be any great crowd or any unusual danger to passengers: p. 309. Here the crowd was invited to come into the gallery, and an entertainment was provided for them calculated to draw them to the front rail, which was not strengthened with any suitable safeguard. The mischief did not arise here from an unexpected and unforeseen cause; what happened was just what might have been and should have been expected in the given conditions.

The judgment should be affirmed with costs.

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APPEAL.

1. *To Divisional Court—Mining Act of Ontario, 1908, sec. 151 (3)—“Deemed to be Abandoned”—Power to Extend Time.*—Section 151 (3) of the Mining Act of Ontario, 1908, provides that unless an appeal (to a Divisional Court of the High Court) is set down and a certificate of such setting down lodged within a specified time, “the appeal shall be deemed to be abandoned.”—

Held, that “deemed” means nothing less than “adjudged” or “conclusively considered” for the purposes of the legislation.

Review of the authorities.

And where the time for lodging a certificate had expired and no certificate had been lodged when

a motion to quash an appeal which had been set down came on for hearing, the appeal was quashed, the Court having no power to extend the time.

Reekie v. McNeil (1899), 31 O.R. 444, followed. *Re Rogers and McFarland*, 622.

2. *To Divisional Court.*—*Reversal of Trial Judge’s Finding of Fact—Duty of Appellate Court—Evidence—Cause of Fire—Sparks from Railway Locomotive—Conjecture—Misapprehension of Evidence.*—Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of it, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse the findings.

In an action to recover damages for the destruction of property of the plaintiff by fire alleged to have been started by sparks from a locomotive of the defendants, the trial Judge, MACMAHON, J., found in favour of the plaintiffs:—

Held, by a Divisional Court, reversing the finding, which was based upon a misapprehension of the evidence, that the plaintiffs had failed to meet the onus cast

upon them by the law and to prove that the fire which caused the damage came from the defendants' engine.

In every case there must be evidence from which it can fairly be inferred, not simply guessed, that the damage was caused by the defendant.

Connacher v. City of Toronto, an unreported decision of the Queen's Bench Division, 4th March, 1893, and *Campbell v. Acton Tanning Co.*, an unreported decision of the Court of Appeal, 29th June, 1900, specially referred to. *Beal v. Michigan Central R.R. Co.*, 502.

3. *To Privy Council—Application to Allow Security—Jurisdiction—Matter in Controversy—R.S.O. 1897, ch. 48, sec. 1.*—Where the sole question in two actions was as to the validity of an order of the Railway Committee of the Privy Council of Canada requiring the plaintiffs to build a bridge:—

Held, refusing an application to allow the security upon a proposed appeal to His Majesty in His Privy Council from the decision of the Court of Appeal, that an appeal did not lie as of right under R.S.O. 1897, ch. 48, sec. 1; MEREDITH, J.A., dissenting upon the ground that the subject of the controversy was, in substance, the bridge, the cost of building which would far exceed the statutory limit of \$4,000.

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4. *To Privy Council—Security—Payment of Money into Court—R.S.O. 1897, ch. 48, sec. 2—Con.*

Rules 831, 833.—Where the security required upon an appeal to the Privy Council is given by payment of money into Court, instead of by a bond in the penal sum of \$2,000, as provided by Con. Rule 831, the sum paid in must not be less than \$2,000, having regard to the provisions of sec. 2 of R.S.O. 1897, ch. 48; the explicit language of the section cannot be held to be varied by the general words of Con. Rule 833. *Florence Mining Co. v. Cobalt Lake Mining Co.*, 342.

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ASSIGNMENTS AND PREFERENCES.

1. *Assignment for Benefit of Creditors—Claim on Insolvent Estate for Rent and Taxes—R.S.O. 1897, ch. 170, sec. 34 (1)—Provisions of Lease—Application to Agent of Lessee in Possession—Yearly or Monthly Subtenancy—Accelerated Rent—Preferred Claim—Extra-provincial Corporation—*

Status to Maintain Action — License.]—The plaintiffs, for the purpose of carrying on a branch of their business, on the 1st March, 1907, became the lessees of a store at B., the lease being for five years, at an annual rental of \$800, payable monthly, and containing covenants by the plaintiffs to pay rent, taxes, etc., and not to assign, but they were permitted to sublet to an agent to carry on the business. The plaintiffs appointed H. their agent at B. for a term of five years, subject to determination, on notice. The plaintiffs alleged that H. also became sublessee for the term of the lease, and subject to all its liabilities; but, although a proper document had been prepared, no sublease was ever executed, it being conditional on H.'s furnishing security, which he failed to do. H. entered into possession, however, and carried on the business, paying the monthly instalments of rent up to September, 1907. On the 9th January, 1908, he made an assignment for the benefit of his creditors, to the defendant. H.'s appointment as agent had been cancelled on the 1st August, 1907, and in May, 1908, by an arrangement made with their landlord, the plaintiffs' lease was cancelled:—

Held, that H.'s holding was merely that of a monthly tenant, so that, as against him or his assignee, only the monthly rent due under such tenancy could be claimed, and not accelerated rent, made payable under the plaintiffs' lease in case of an assignment, etc.; nor could a claim for the taxes be maintained, the taxes, in the circumstances, being properly payable by the plaintiffs.

Section 34 of R.S.O. 1897, ch. 170, does not apply to a monthly

tenancy, but only to a lease of at least a year's duration.

The plaintiffs' right to maintain the action was attacked, on the ground that, being an extra-provincial corporation, they had no license to do business in Ontario, as required by 63 Vict. ch. 24, secs. 6 and 14 (O.):—

Held, per RIDDELL, J., that such a license was necessary, but the difficulty was removed by the production of it after the argument of the appeal.

Bessemer Gas Engine Co. v. Mills (1904), 8 O.L.R. 647, followed.

Judgment of BOYD, C., at the trial, affirmed. *Semi-Ready Limited v. Tew*, 227.

2. *Assignment for Benefit of Creditors—Promissory Note of Partnership and Members—Joint and Several or Joint Note—Claim on Estate of Partner—R.S.O. 1897, ch. 147, sec. 7—Election.*]—A promissory note, beginning "we promise," was signed by a partnership firm and by the two members thereof in their individual names:—

Held, that the plaintiff, the holder of the note, was entitled to rank upon the insolvent estate of one of the partners in respect of a claim upon the note.

Per OSLER, J.A., that the note was to be considered the joint and several note of the partnership and the individual members; that the claim in respect of the partnership liability must, by sec. 7 of the Assignments and Preferences Act, rank first upon the estate—the partnership estate—by which it was contracted, and the claim in respect of the individual liability, by the same section, upon the estate—the individual estate—by which it was contracted; as the

individual creditor of the partner, the plaintiff could not rank on that indebtedness against the partnership estate until the partnership creditors were paid, and *vice versa*; whether, as holder of the contract of each, the section put the plaintiff to his election against which estate he would rank, it was not necessary to decide, for he had by his pleading expressly elected to rank against the individual estate, and nothing that he did in proving his claim against the partnership estate estopped him from doing so, as, even if bound to elect, he might do so at any time before the declaration of a dividend.

Per MEREDITH, J.A., that, the fact being that the debt was a debt of the firm guarantied by one of the members of the firm, the question whether the note was a joint and several one, or merely a joint one, was not material; the plaintiff had a legal claim against the firm and a separate legal claim against the partner, although each was in respect of the same debt; and such a case is not within sec. 7 of the Act; nor is there anything in the enactment requiring an election as to which estate the plaintiff will first look to for payment.

Judgment of a Divisional Court, 18 O.L.R. 340, affirmed. *Gordon v. Matthews*, 564.

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BANKS AND BANKING.

Crediting Customer with Amount of Cheque—Negotiation—Holder for Value—Dishonour of Cheque—Honouring Subsequent Cheques—Bills of Exchange Act, secs. 22, 54, 56, 58, 70, 74, 165.]— The account of M. at the plaintiffs' bank was \$409.53 overdrawn. On May 23rd he posted to the plaintiffs from Chicago a cheque of W. & Co. for \$1,000, dated May 16th, with instructions to place the amount to his credit, which the plaintiffs did on receipt on May 26th, thus leaving a credit balance in M.'s favour of \$590.47. On the same day the plaintiffs sent this cheque for collection to the clearing house, but it was returned dishonoured on May 27th, W. & Co. having stopped payment on May 23rd. On May 28th certain cheques drawn by M. on his account came in, which the plaintiffs paid and charged up. The plaintiffs again twice sent the \$1,000 cheque to the clearing house, but it was on each occasion returned unpaid, the plaintiffs on each occasion crediting and debiting M.'s account with the \$1,000.

The plaintiffs now sued W. & Co. on the \$1,000 cheque. It was admitted that M. had not given consideration for it, and that, if he were holder, he could not recover on it:—

Held, that the plaintiffs, by crediting M.'s account with \$1,000 on receipt of the cheque sued on, became holders for value of the latter. The position of the plaintiffs, with reference to the cheque sued on, became fixed when the latter was negotiated to them, and nothing which took place subsequently altered the plaintiffs' position, except that by the dishonour of the cheque and notice to M. his liability in respect to it became absolute, having previously been only conditional.

Held, also, that the interval between May 16th, the date of the cheque, and May 23rd, the date of its being mailed to the plaintiffs, was not, in the circumstances, sufficient to give the cheque the character of an overdue bill, so as to make it, under sec. 70 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, subject in the plaintiffs' hands to any defect of title affecting it.

Held, also, that sec. 22 of the Bills of Exchange Act applies to cheques.

Judgment of MULLOCK, C.J. Ex.D., varied. *Bank of British North America v. E. D. Warren & Co.*, 257.

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BILLS AND NOTES.

1. *Drafts on Bank—Death of Payee before Presentation — Foreign Domicile — Rights of Foreign Administrator—"Holder" of Bills—Contract of Drawer of Bills—Rights of Ontario Administrator—Money in Court—Retention of Part to be Paid out in Ontario—Costs.*]—Y., domiciled in the State of California, when on a visit to the Province of Ontario bought from the Bank of Montreal there two drafts, for \$1,000 each, upon a New York bank, and when he died in California they were found among his effects, never having been presented for acceptance or payment. The plaintiff was appointed by a California court administrator of Y.'s estate, and presented the drafts for payment to the New York bank, who refused to accept, the Bank of Montreal having stopped payment of them. The plaintiff then claimed the amount of the drafts from the Bank of Montreal, and the defendant, the Ontario administrator of Y., also making a claim and bringing an action against the bank, the bank paid \$2,000 (less costs) into Court, and an issue was directed between the plaintiff and defendant:—

Held, that the Bank of Montreal by becoming the drawers of the bills did not undertake that the New York bank would accept and pay in New York, but did guarantee that if the New York bank did not do so, they themselves would, if duly notified, reimburse the holder; this was a contract with Y., and he might enforce it; it did not die with Y.; and the plaintiff, the duly appointed representative of Y. in California, where the drafts passed into his hands, was the holder in the legal and mercantile sense; and the money paid

into Court represented the drafts and was in the same ownership.

As the defendant was the next of kin of Y., and all the money was not required for payment of debts, it was considered not advisable to pay money out of Court to a foreign administrator, who would necessarily repay some of it to the defendant in Ontario; consequently the latter was allowed the option of a reference to determine the amount which should be sent to the plaintiff; and the costs of both parties were ordered to be paid out of the fund, those of the plaintiff in priority.

Judgment of MAGEE, J., reversed. *Young v. Cashion*, 491.

2. *Promissory Note—Irregular Indorsement*—"Holder in Due Course"—*Aval—Collateral Agreement—Estoppel—Statute of Frauds—Bills of Exchange Act*, sec. 131.]—The plaintiff brought actions on two promissory notes, for \$6,000 and \$2,000 respectively, made by G. J. C. and W. C. K. as makers, and payable to the order of the plaintiff as payee. The notes were indorsed by the defendant J. S. C. before they were delivered to the plaintiff, who subsequently indorsed them. The notes were given in renewal of a note for \$8,000 between the same parties, which also had been indorsed by the plaintiff subsequently to the indorsement by J. S. C. By a sealed agreement of the same date as the \$8,000 note (21st May, 1907), which was executed by J. S. C. and the other parties, it was stated that the note was given as security for the price of certain mining claims purchased by him in company with G. J. C. and W. C. K. from the plaintiff, and that J. S. C. was "the indorser of the note:"—

Held, that J. S. C. was liable on the notes.

Per OSLER and MACLAREN, JJ.A., that J. S. C. was liable to the plaintiff as "to a holder in due course," within the meaning of R.S.C. 1906, ch. 119, sec. 131.

Robinson v. Mann (1901), 31 S.C.R. 484, followed.

J. S. C. was also liable to the plaintiff on the ground of estoppel, inasmuch as he was bound by the agreement of the 21st May, 1907, and it was not open to him to raise any defence based upon the irregular indorsement of the notes.

Per MEREDITH, J.A., that, upon the evidence adduced, J. S. C. had an interest in the lands as a principal as regards the plaintiff, and was liable to pay the contract price; and, even if his liability were only that of a surety for his co-defendants, the deed of the 21st May, 1907, was sufficient evidence of his contract under the Statute of Frauds.

Judgment of CLUTE, J., affirmed. *McDonough v. Cook*, 267.

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BROKER.

Purchase of Shares for Customer on Margin—Hypothecation—Conversion—Delivery of Shares—Trover—Damages—Misrepresentation—Interest—Payment in Excess of Legal Rate—Contract.]—

The defendants, who were brokers, purchased for the plaintiff certain shares of the stock of incorporated companies; she paid them a small portion of the purchase money therefor, and owed them the balance, the defendants being entitled to hold the shares until the plaintiff paid them the amount owing in respect thereof. The defendants borrowed, on the security of these shares and of others, a sum of money in excess of the amount owing by the plaintiff. After the lapse of some months the plaintiff applied to the defendants for the shares, and, upon her paying the amount claimed by the defendants as due in respect thereof, they were at once transferred to her. At no time was delivery wrongfully withheld from her, and she sustained no actual damage because of the hypothecation of the shares. It was contended by the plaintiff, however, that upon hypothecation of the shares by the defendants there was a conversion, and that all moneys paid by her on account of the purchase money were recoverable as damages in an action of deceit—that the defendants had so dealt with the plaintiff's property that they could not, in an action of trover, be allowed to deliver the shares in mitigation of damages:—

Held, that the plaintiff was not damaged by the hypothecation of the shares, and there was, therefore, no misrepresentation which gave her a cause for action. The delivery of the shares to her

annulled the effect of their previous technical conversion, and restored both parties to their former positions, thus leaving the plaintiff in debt to the defendants for the unpaid purchase money, in paying which she was discharging a legal liability, and therefore had no cause of action because of such payment.

The plaintiff also claimed repayment of interest paid to the defendants in excess of the legal rate:—

Held, that an agreement on her part to pay the rates charged was shewn by her conduct, and, the rates being reasonable, no portion of the moneys paid on account of interest was recoverable.

Judgment of MACMAHON, J., affirmed. *Clark v. Baillie*, 545.

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CARRIERS.

Lost Luggage—Contract of Carriage—Receipt—Condition Limiting Liability—Notice—Agents of Owner—Alteration of Oral Contract—Negligence—Damages.]—

The defendants were an incorporated company, a main part of whose business was to carry and deliver baggage or luggage for customers, to and from railways, steamboats, and other public conveyances. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the Customs, handed the check to H., also a Customs officer, and asked him to pass the trunk and

have it sent up to the house. H. gave D., the defendants' agent on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned in about fifteen minutes after he had left the check and the money with D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it—he knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the check to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the articles for which the receipt was given, subject to a condition that they should “not be liable for any loss or damage of any trunk . . . for over \$50.” The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen; but without negligence on the part of the defendants. The defendants tendered to the plaintiff \$50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action:—

Held, MEREDITH, J.A., dissenting, that the plaintiff was entitled to recover the full value of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care, in the absence of notice, brought home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract.

Harris v. Great Western R.W. Co. (1876), 1 Q.B.D. 515, *Henderson v. Stevenson* (1875), L.R. 2 H.L. Sc. 470, and other cases bearing on the liability of carriers for loss or damage to luggage, discussed.

Per MEREDITH, J.A., that the question whether the plaintiff had accepted the condition limiting the defendants' liability was one of fact, and the finding of the trial Judge in favour of the defendants should not be reversed unless plainly shewn to be wrong on the evidence.

Judgment of a Divisional Court, reversing the judgment of *Boyd*, C., at the trial, affirmed. *Lamont v. Canadian Transfer Co. Limited*, 291.

See RAILWAY, 2,3, 4.

CASES.

Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co. (1880), 27 Gr. 592, distinguished.]
—See PLEADING.

Bessemer Gas Engine Co. v. Mills (1904), 8 O.L.R. 647, followed.]—See ASSIGNMENTS AND PREFERENCES, 1.

Blackley v. Toronto R.W. Co. (1897), 27 A.R. 44 n., applied and followed.]—See FATAL ACCIDENTS ACT.

Bowden v. Laing (1844), 14 Sim. 113, doubted.]—See WILL, 3.

Bunting v. Bell (1876), 23 Gr. 584, considered.]—See MECHANICS' LIENS, 2.

Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449, followed.]—See CONTRACT, 2.

Campbell v. Acton Tanning Co. (1900), unreported, specially referred to.]—See APPEAL, 2.

Capital and Counties Bank v. Gordon, [1903] A.C. 240, distinguished.]—See PARTNERSHIP, 1.

Carr v. Living (1860), 28 Beav. 644, doubted.]—See WILL, 3.

Carter v. Clarkson (1893), 15 P.R. 379, 380, approved.]—See PLEADING.

Cashman and Cobalt and James Mines Limited, Re (1907), 10 O.W.R. 658, followed and also distinguished.]—See MINES AND MINERALS, 1, 2.

Connacher v. City of Toronto (1893), unreported, specially referred to.]—See APPEAL, 2.

Cook v. Noble (1886), 12 O.R. 81, distinguished.]—See WILL, 3.

Crossby v. Innes (1837), 5 Dowl. P.C. 566, followed.]—See DEFAMATION.

Darlington District Joint Stock Banking Co., Ex p. (1865), 4 D.J. & S. 581, 11 Jur. N.S. 122,

distinguished.]—See PARTNERSHIP, 1.

Davis v. Flagstaff Silver Mining Co. of Utah (1878), 3 C.P.D. 228, followed.]—See SALE OF GOODS.

Duncan v. Perthshire Cricket Club (1904), 42 Sc.L.R. 327, followed.]—See NEGLIGENCE, 2.

Egan v. Miller (1887), 7 C.L.T. Occ. N. 443, distinguished.]—See DEFAMATION.

Fitzjohn v. Mackinder (1861), 9 C.B.N.S. 505, distinguished.]—See MALICIOUS PROSECUTION.

Francis v. Cockrell (1870), L.R. 5 Q.B. 501, followed.]—See NEGLIGENCE, 2.

Fraser, In re, Lowther v. Fraser, [1904] 1 Ch. 726, distinguished.]—See WILL, 1.

Goode v. Downing (1904), 5 Terr. L.R. 505, approved and followed.]—See MASTER AND SERVANT, 3.

Gordon v. Matthews (1909), 18 O.L.R. 340, affirmed.]—See ASSIGNMENTS AND PREFERENCES, 2.

Hall v. Hogg (1890), 20 O.R. 13, considered.]—See MECHANICS' LIENS, 2.

Harris v. Great Western R.W. Co. (1876), 1 Q.B.D. 515, discussed.]—See CARRIERS.

Henderson v. Stevenson (1875), L.R. 2 H.L.Sc. 470, discussed.]—See CARRIERS.

Imperial Trusts Co. v. New York Security and Trust Co. (1905), 10 O.L.R. 289, approved.]—See MORTGAGE.

Jones v. Imperial Bank of Canada (1876), 23 Gr. 262, distinguished.]—See PLEADING.

Kerrison v. Smith, [1897] 2 Q.B. 445, followed.]—See LICENSE.

Lake Erie and Detroit River R.W. Co. v. Sales (1893), 26 S.C.R. 663, distinguished.]—See RAILWAY, 3.

Lindop v. Martin (1883), 3 C.L.T. 312, distinguished.]—See MECHANICS' LIENS, 1.

London County Council v. Dundas, [1904] P. 1, referred to and discussed.]—See LICENSE.

Lowe v. Adams, [1901] 2 Ch. 598, referred to and discussed.]—See LICENSE.

McNeil and Plotke, Re (1908), 13 O.W.R. 6, distinguished.]—See MINES AND MINERALS, 2.

Mercer v. Canadian Pacific R.W. Co. (1908), 17 O.L.R. 585, distinguished.]—See RAILWAY, 2.

Morris v. Tharle (1893), 24 O.R. 159, distinguished.]—See MECHANICS' LIENS, 1.

Munro and Downey, Re (1909), 19 O.L.R. 249, distinguished.]—See MINES AND MINERALS, 2.

Mykel v. Doyle (1880), 45 U.C.R. 65, followed.]—See EASEMENT.

Naviera Vasconzanda, Compania, v. Churchill, [1906] 1 K.B. 237, distinguished.]—See SALE OF GOODS.

Neil v. Norman (1901), 21 C.L.T. Occ. N. 293, distinguished.]—See DEFAMATION.

Newell v. Hemingway (1888), 60 L.T.R. 544, applied and followed.]—See CLUB.

Pattison v. Township of Wainfleet (1902), 1 O.W.R. 407, discussed.]—See HIGHWAY.

Pinhorne, In re, [1894] 2 Ch. 276, discussed and followed.]—See WILL, 2.

Pym v. Great Northern R.W. Co. (1862), 2 B. & S. 759, applied and followed.]—See FATAL ACCIDENTS ACT.

Reekie v. McNeil (1899), 31 O.R. 444, followed.]—See APPEAL, 1.

Rex v. Bond, [1906] 2 K.B. 389, discussed.]—See CRIMINAL LAW, 1.

Rex v. Greenacre (1837), 8 C. & P. 35, followed.]—See CRIMINAL LAW, 3.

Rex v. Kehr (1906), 11 O.L.R. 517, specially referred to.]—See MALICIOUS PROSECUTION.

Rex v. Morgan (1901), 5 Can. Crim. Cas. 63, 272, 2 O.L.R. 413, 3 O.L.R. 356, followed.]—See CRIMINAL LAW, 6.

Rex v. Robinson (1907), 14 O. L. R. 519, overruled.]—See TRESPASS.

Rex v. Taylor (1906), 12 Can. Crim. Cas. 244, approved.]—See TRESPASS.

Robinson v. Mann (1901), 31 S.C.R. 484, followed.]—See BILLS AND NOTES, 2.

Robinson v. Morris (1908), 15 O.L.R. 649, distinguished.]—See DEFAMATION.

St. John v. Rykert (1884), 10 S.C.R. 278, distinguished.]—See MORTGAGE.

Scarf v. Jardine (1882), 7 App. Cas. 345, distinguished.]—See PARTNERSHIP, 2.

Scott v. Patterson (1908), 17 O.L.R. 270, referred to.]—See PLEADING.

Secord and County of Lincoln, Re (1865), 24 U.C.R. 142, followed.]—See MUNICIPAL CORPORATIONS, 1.

Stewart v. Jones (1859), 3 De G. & J. 532, discussed and distinguished.]—See WILL, 2.

Stockton and Middlesbrough Water Board v. Kirkleatham Local Board, [1893] A.C. 444, distinguished.]—See STREET RAILWAY, 1.

Stubbins, In re (1881), 17 Ch.D. 58, distinguished.]—See COMPANY.

Taylor, Ex p. (1886), 18 Q.B.D. 295, distinguished.]—See COMPANY.

Taylor v. Scott (1899), 30 O.R. 475, followed.]—See CRIMINAL LAW, 4.

Toronto, City of, v. Toronto Electric Light Co. (1906), 11 O.L.R. 310, followed.]—See APPEAL, 3.

Toronto, City of, v. Toronto R.W. Co., [1907] A.C. 315, followed.]—See STREET RAILWAY, 2.

Toussignant v. County of Nicolet (1902), 32 S.C.R. 353, followed.]—See APPEAL, 3.

Wallace v. People's Life Insurance Co. (1899), 30 O.R. 438, followed.]—See SALE OF GOODS.

Whitmore, In re, [1902] 2 Ch. 66, discussed and followed.]—See WILL, 2.

Willets v. Watt & Co., [1892] 2 Q.B. 92, referred to.]—See MASTER AND SERVANT, 1.

Wood v. Leadbitter (1845), 13 M. & W. 838, referred to and discussed.]—See LICENSE.

CERTIORARI.

See CRIMINAL LAW, 6.

CHEQUE.

See BANKS AND BANKING — PARTNERSHIP, 1.

CLERK OF THE PEACE.

See MUNICIPAL CORPORATIONS, 2.

CLUB.

Incorporation under Ontario Companies Act — “Proprietary Club” — “Billiard Tables and Bowling Alley on Club Premises” — “Municipal By-law Requiring License” — “Hire or Gain” — “House of Public Entertainment or Resort” — “Police Magistrate” — “Case Stated under Ontario Summary Convictions Act” — “Forum” — “Divisional Court” — “Scope of Case” — “Admissibility of Evidence.” — A club was incorporated by letters patent under the Ontario Companies Act, to encourage and promote billiard playing and other athletic and amateur sports, etc. The members were all shareholders in the capital stock of the club, and no person could become a member unless he subscribed for and became the holder of a share or shares, and no persons other than members were permitted to have the use of the club premises. Premises were leased by the club in the city of Toronto, whereon there were bowling alleys and billiard tables. Fees were paid by the members for games played on the bowling alleys and billiard tables, and such fees went into the funds of the club and were used for paying the expenses of managing and carrying on the club. By a resolution of the club,

the directors were empowered to apply fees paid for games played on the alleys or tables of the club as payment for shares subscribed.

A by-law of the police commissioners for the city of Toronto, passed pursuant to the powers conferred by the Consolidated Municipal Act, 1903, sec. 583, sub-secs. 4 (as amended by 8 Edw. VII. ch. 48, sec. 14) and 10, provided that a license should be taken out by (9) every person who, for hire or gain, directly or indirectly keeps or has in his possession, or on his premises, any billiard table, or who keeps or has a billiard table in a house or place of public entertainment or resort, and every proprietary club (as defined by the Consolidated Municipal Act, 1903), which directly or indirectly keeps or has in its possession or on its premises any billiard table; and also (10) by every person who owns or keeps for hire or profit a bowling alley.

The club had no license for billiard tables or for a bowling alley:—

Held, that the club was not a "proprietary" one, as defined by the amending Act, 8 Edw. VII. ch. 48, sec. 14; and (RIDDELL, J., dissenting) that the billiard tables and bowling alley were not kept or in the possession of the club for hire or gain, directly or indirectly, nor was the place where the tables were kept a house of public entertainment or resort, within the meaning of the by-law.

Newell v. Hemingway (1888), 60 L.T.R. 544, applied and followed.

Held, per curiam, that cases stated by a police magistrate under R.S.O. 1897, ch. 90, secs. 2 (1) and 8, as amended by 1 Edw. VII. ch. 13, sec. 2, and so (by reference) under R.S.C. 1906, ch.

146, sec. 761, properly came before a Divisional Court, under 4 Edw. VII. ch. 11, sec. 2 (Judicature Act, sec. 67, sub-sec. (1) (e); but that, under sec. 761, all that can be done is to "question a conviction, order, determination or other proceeding," and so a question as to the admissibility of evidence cannot form part of a stated case. And, *per* RIDDELL, J., that the evidence taken before the magistrate should not be sent up by him as part of the case.

Semble, per FALCONBRIDGE, C.J.K.B., that the magistrate was right, on a charge preferred against the incorporated club, in refusing to allow questions to be put to a witness with the object of shewing that the club was incorporated for the purpose of enabling an individual to evade the provisions of the by-law. *Rex v. Dominion Bowling and Athletic Club Limited*, 107.

COMPANY.

Winding-up — Payment to Creditor within 30 Days—Preference—Winding-up Act, sec. 99—Restoration of Trust Moneys—Breach of Trust—Commencement of Winding-up.]—On the 14th October, 1905, a sum of \$1,340.57 was deposited in a bank to the credit of H., executor, and was on that day withdrawn by him and placed to the credit of a company, of which he was president, in its account with the same bank. This money was held by H. in trust for the children of M., and the placing of the money to the credit of the company was a breach of trust by him. On the 6th December, 1906, the company being then insolvent, H. withdrew from the assets of the company for his *cestuis que trust*

a sum of \$1,969.61, the purpose being admittedly to protect the *cestuis que trust* and to give them a preference. This sum was debited to an account in the books of the company, headed "H. in trust for M.," etc., at the credit of which there was a large balance, including the \$1,340.57. A petition for an order for the winding-up of the company was served on the same day on a solicitor who accepted service on behalf of the company, and on the 11th December, 1906, a winding-up order was made:—

Held, that the money handed over by the trustee to the company was, when the \$1,969.61 was withdrawn, no longer capable of being ear-marked, and it was impossible for the *cestuis que trust* to follow it; the company was simply a debtor to the trust estate for the amount which it had received from the trustee, and the withdrawal of the money was in substance and effect a payment by the company to its creditors of so much of what it owed them; and therefore sec. 99 of the Winding-up Act, R.S.C. 1906, ch. 144, applied, and the liquidator of the company was entitled to recover from the trustee and *cestuis que trust* the amount withdrawn.

By sec. 99 the payment is void when made to a person knowing the inability of the company to meet its engagements, and the view of the debtor in making the payment is not made an element to be inquired into in the application of the section.

In re Stubbins (1881), 17 Ch. D. 58, and *Ex p. Taylor* (1886), 18 Q.B.D. 295, distinguished.

Quære, whether the impeached transaction took place after the commencement of the winding-up.

up. *Trusts and Guarantee Co. v. Munro*, 480.

See ASSIGNMENTS AND PREFERENCES, 1—CLUB.

CONFESSION.

See CRIMINAL LAW, 6.

CONSIDERATION.

See CONTRACT, 2.

CONSTABLE.

See TRESPASS.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 4—MINES AND MINERALS, 1.

CONTRACT.

1. *Advertisement — Redemption of Bonds—Specific Performance—Mortgage Trust Deed—Construction—Breach of Trust—Trustees Acting Honestly and Reasonably—62 Vict. (2) ch. 15, sec. 1 (O.)*—A mining company, on the 1st June, 1905, issued bonds to the face value of \$1,000,000, secured by a mortgage trust deed, of the same date, to the defendants; and the plaintiff became the holder of \$10,000 thereof. In May, 1907, the defendants advertised for offerings of the bonds for redemption; the plaintiff offered his \$10,000 at 82; the defendants did not accept; they redeemed other bonds, some at a higher rate, but did not redeem the plaintiff's.

In an action for breach of trust by the defendants as trustees and for specific performance of an alleged contract or damages in

lieu thereof, the plaintiff contended that the defendants were trustees under all the terms of the trust deed, one term being that from the bonds offered the defendants should purchase those bonds which were offered at the lowest price; that, as the advertisement referred to the trust deed, the advertisement should be taken as though the defendants were expressly promising to buy in accordance with the terms of the trust deed; that this constituted an offer by the defendants to buy upon the tender at the lowest price; that the plaintiff did so tender; and consequently the defendants were bound:—

Held, that the deed was not by implication made part of the advertisement; but, if it were, that the direction to purchase at the lowest price was not to be interpreted literally, but in a business sense; the object was to redeem as many bonds as possible at the cheapest rate—to spend the money furnished by the mining company in reducing as much as possible their bonded indebtedness; and the method pursued by the defendants, having regard to the offerings made, was unexceptionable from a business point of view, and was not a violation of the terms of the trust deed.

Held, also, that the defendants had, in the premises, acted honestly and reasonably, and ought fairly to be excused for the breach of trust, if there was one: 62 Vict. (2) ch. 15, sec. 1 (O.) *Whicher v. National Trust Co.*, 605.

2. *Promise to Pay Money—Consideration—Forbearance to Sue—Belief in Cause of Action—Guaranty.*—The plaintiff and G. had each lent money to the de-

fendant's brother to assist him in carrying on business as a hotel-keeper; the hotel was burned; G., meeting the defendant, said something to him about the insurance, and the defendant said it did not matter about the insurance, as far as the plaintiff and G. were concerned—"I am going to pay you people"—or words to the same effect. G. informed the plaintiff of this undertaking, and some months later the plaintiff wrote to the defendant asking if he (plaintiff) might draw on defendant for the amount of his account. The defendant wrote in answer: "I told G. I would see you would not be losers for cash advanced; I did not promise to pay the amount, but in time see you were paid." More than a year afterwards the defendant asked the plaintiff to wait till the insurance was adjusted. The plaintiff at the trial swore that he waited because the defendant asked him to. The money was advanced in 1901, the hotel was burned in 1902, and it was not until June, 1907, that the defendant finally refused to pay anything:—

Held, that, as the plaintiff believed he had a good cause of action, and delayed taking proceedings upon the promise that the defendant would pay the amount he had agreed to pay if the plaintiff would wait, there was a good consideration, and the plaintiff was entitled to recover from the defendant the amount advanced to the defendant's brother.

Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449, followed.

Judgment of District Court of Rainy River affirmed. *Drewry v. Percival*, 463.

3. *Services by Sister to Brother*—*Remuneration*—*Quantum Meruit*—*Statute of Limitations*—*Moneys Voluntarily Expended*—*Promise of Widower not to Re-marry*—*Public Policy*.]—The plaintiff, who was a sister of the defendant, abandoned her occupation and went to live with him in 1895, upon the death of his wife, to take care of his household and children, upon his representations that he would not marry again, that she would have a home with him for her life, unless he predeceased her, and in that event she would have the benefit of an insurance on his life effected for her benefit. There was nothing in writing, and no oral promise to pay the plaintiff wages. The plaintiff lived with the defendant and cared for his house and children until 1908, when he re-married. The plaintiff sued for damages for breach of the contract which she alleged, and for moneys expended by her on the defendant's behalf:—

Held, that the representation of the defendant that he would not marry again was merely an expression of intention; a contract of a widower not to marry again would be void as against public policy; because of the representations made by the defendant, the plaintiff was entitled to recover the value of her services for the last six years before action; but was not entitled to recover for moneys expended by her voluntarily and without the request of the defendant.

Judgment of the Judge of the County Court of Essex affirmed. *Bradley v. Bradley*, 525.

See BROKER — CARRIERS — INFANT — INSURANCE — LICENSE — MASTER AND SERVANT, 4—MECHANICS' LIENS—RAILWAY, 1, 2,

3—STREET RAILWAY — SALE OF GOODS.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1.

CONVERSION.

See BROKER—PARTNERSHIP, 1.

CONVICTION.

See CRIMINAL LAW—MUNICIPAL CORPORATIONS, 3.

COSTS.

Set-off—*R.S.O. 1897, ch. 324, sec. 7*—*Set-off Exceeding Plaintiff's Claim*—*Judgment for Defendant for Balance*—*Form of Judgment*—*Set-off Pleaded as Counterclaim*—*Appeal as to Costs*—*Discretion*—*Erroneous Principle*.]—Where the claims of the respective parties to the action consist of mutual debts, they are subject to the statutory provisions relating to set-off, now found in *R.S.O. 1897, ch. 324, secs. 5, 6, 7*. History of sec. 7, which provides that if upon a defence of set-off a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant shall be entitled to judgment for the balance.

Set-off and counterclaim, in our practice, remain in their nature different. The latter is in strictness a cross-action or claim for relief which cannot be obtained by the defendant in the action, and the costs of the action and counterclaim are usually dealt with as if the claims of the respective parties were the subjects

of separate actions; while a set-off, when proved, is not only a statutory defence to the action, but where the defendant's claim over-tops that of the plaintiff he is also by sec. 7 entitled to judgment for the excess, the latter not being, as in England, necessarily or properly the subject of counterclaim, but rather an incident of the defence.

The proper judgment, therefore, when the defendant proves a set-off equalling the plaintiff's claim, is a dismissal of the action, and, if exceeding it, also a judgment for the excess.

Where the defendant, in asserting a set-off or other claim which is merely a matter of defence, pleads it as a counterclaim, the practice is to disregard the form of the pleading, and to dispose of the action and costs in accordance with the real character of the defence.

Review of the authorities.

Judgments of MEREDITH, C.J.C.P., and a Divisional Court, reversed, and judgment directed to be entered for the defendant dismissing the action and for the excess of the amount found due to him over that found due to the plaintiff, with costs.

Costs are by statute and Rule of Court in the discretion of the Court or Judge; but when such discretion has been exercised upon an erroneous principle or upon a misapprehension of the facts—in other words, where there has been no real exercise of judicial discretion—an appeal lies without leave. *Gates v. Seagram*, 216.

See **BILLS AND NOTES**, 1—**CRIMINAL LAW**, 5—**DEFAMATION**—**LANDLORD AND TENANT**—**MINES AND MINERALS**, 1—**MORTGAGE**—**PATENT FOR INVENTION**—**SALE OF GOODS**.

COUNTERCLAIM.

See **COSTS**—**JUDGMENT**—**LANDLORD AND TENANT**—**SALE OF GOODS**.

COUNTY COUNCIL.

See **MUNICIPAL CORPORATIONS**, 2.

COUNTY COURTS.

See **SALE OF GOODS**.

COVENANT.

Restraint of Trade — Breach — Liquidated Damages — Penalty — Actual Damage—Injunction.]—In consideration of the purchase by the plaintiffs from the defendants of part of the stock in trade of a hardware business carried on in a village, the defendants covenanted with the plaintiffs that they (the defendants) would not carry on the business of hardware merchants in the village or elsewhere within five miles thereof for a period of ten years, etc.; and for the due performance of the agreement, the parties agreed that \$500 should be the measure of damages for the breach thereof, and that that sum should be recoverable by the plaintiffs as liquidated damages and not as a penalty:—

Held, that, notwithstanding the use of the words "liquidated damages," the \$500 was a penalty; and for breach of the covenant the plaintiffs were entitled only to the actual damage sustained and to an injunction against further breaches of the agreement.

Judgment of the County Court of Essex reversed. *Townsend v. Rumball*, 433.

See **MORTGAGE**.

CRIMINAL LAW.

1. *Abortion—Defence—Lawful Operation—Evidence in Reply of Previous Criminal Act—Unlawful Intent—System—Inadmissible Evidence—New Trial.*—Upon an indictment of the defendants (P., a physician and surgeon, and T., a boarding-house keeper) for procuring an abortion, the case for the Crown was that the defendants had performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, and the defendant P. swore that the operation was performed for a lawful purpose, and without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that P. had been employed to operate and had operated upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or, in other words, to prove the unlawful intent:—

Held, that the testimony of these witnesses was improperly admitted, there being no evidence of a system which would let in proof of a single prior criminal act as part of it.

The King v. Bond, [1906] 2 K.B. 389, discussed.

The conviction of the defendants was set aside, and a new trial was directed under sec. 1018 (b) and (d) of the Criminal Code. *Rex v. Pollard and Tinsley*, 96.

2. *Abortion—Intent to Procure—Indictment—"Operate"—Use of Instrument—Evidence—Verdict—Crown Case Reserved—Form of Questions.*—In an indictment laid under sec. 303 of the Criminal Code, R.S.C. 1906, ch. 146, which enacts that "every one is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever with the like intent," the first count charged that the accused, with the intent to procure a miscarriage, etc., did unlawfully use upon the person of the woman an instrument, etc.; the second count charged that with like intent the accused did unlawfully "operate" on the said woman. The evidence submitted by the Crown was directed solely to proof of the fact of the performance of an operation by the use of an instrument, substantially negating the use of the hand or finger alone for the alleged purpose. The jury, however, were charged—after they had intimated that they were not satisfied that the evidence established the use of an instrument—that the use of the hand or finger might be considered in dealing with the second count. The jury found the accused not guilty on the first count, but guilty on the second count:—

Held, MEREDITH, J.A., dissenting, that the second count might not unnaturally be regarded as a mere repetition in another form of the gravamen of the first count, and that by the finding of not guilty on that count the whole case against the accused failed, and the finding on the second count, therefore, could not be supported.

Remarks as to the form of the case reserved. *Rex v. Cook*, 174.

3. *Conviction for Murder—Application for Stated Case—8 & 9 Edw. VII. ch. 9 (D.)—Retroactive Operation—Insanity—Absence of Malice—Intention—Evidence—Culpable Homicide—Wife-beating—Unlawful Act—Act Likely to Cause Death—Refusal to Delay Trial to Procure Evidence—Question of Law—Misdirection—Definition of “Murder” and “Man-slaughter”—Provocation—Cooling Time—Criminal Code, secs. 259, 1014—Intoxication—Appreciation of Nature and Result of Acts—New Trial.*—The prisoner was tried upon an indictment for murdering his wife by repeated blows with an iron poker, convicted, and sentenced to be hanged on the 13th May, 1909, but was reprieved by the Governor-General till the 17th June. No objection was made to the charge of the Judge at the trial; but on the 15th June counsel for the prisoner applied to the Judge to reserve a case for the Court of Appeal under 8 & 9 Edw. VII. ch. 9 (D.), which came into force on the 19th May, 1909, being after the trial, and after the day originally fixed for the execution. The Judge nevertheless consented to hear the application, as it was upon a matter of procedure.

It was urged on behalf of the prisoner that the evidence did not support a verdict of murder, as the prisoner did not intend to kill the deceased, but it was admitted that, subject to the defence of insanity, the act of the accused was culpable homicide:—

Held, by the trial Judge, upon an application to him to state a case for the consideration of the Court of Appeal, that the jury

were properly charged that the prisoner's act could only be for an unlawful object, and that if it was an act which he ought to have known would be likely to cause death, the crime was murder, under sec. 259 of the Code. Whether the act was of such a character was a question for the jury, and could not be withdrawn from them.

It was also urged that a reserved case should be granted on the ground that effect had not been given to an application by the prisoner to delay the trial for two months so as to enable him to produce evidence of insanity:—

Held, that this, not being a question of law, could not be the subject of a reserved case under sec. 1014 of the Code, and that the Act 8 & 9 Edw. VII. ch. 9 was not more comprehensive as to the nature of the questions to be reserved.

Held, also, that the jury were properly charged that when one person has killed another, the law presumes that this is murder unless the contrary is shewn.

Rex v. Greenacre (1837), 8 C. & P. 35, followed.

It was not misdirection to charge the jury that, had one blow only been given, the jury might have found a verdict of manslaughter on the ground of provocation, but not where the blows were repeated after there had been time for the prisoner's passion to cool.

A subsequent application on behalf of the prisoner to the trial Judge to state a case as to whether he should not have charged the jury that they should consider the prisoner's state of intoxication in regard to his appreciation of the nature and result of his acts, was refused; but, on application to

the Court of Appeal, a new trial was ordered upon this ground. *Rex v. Blythe*, 386.

4. *Habeas Corpus — Prisoner Confined under Conviction for Offence against Provincial Act—Procedure—Powers of Provincial Legislature—Jurisdiction of Divisional Court — Application for Second Writ—Res Judicata.*—The procedure applicable to a motion for a writ of *habeas corpus*, where there has been a committal for an infraction of a provincial Act (in this case the Liquor License Act) is such as may be prescribed by the provincial Legislature.

A Divisional Court of the High Court of Justice has no power to hear a motion for a writ of *habeas corpus* unless a Judge has directed that it be made returnable before a Divisional Court, or unless the parties consent to a Divisional Court entertaining the motion: Judicature Act, R.S.O. 1897, ch. 51, sec. 67; R.S.O. 1897, ch. 83, sec. 8; Con. Rule 117; and, even if the Court in this case had jurisdiction to grant a motion made to it for the issue of a second writ, the matter was *res judicata* by the judgment of the Court on a motion to discharge the defendant upon the first writ: 19 O.L.R. 125. (See the next case.)

Taylor v. Scott (1899), 30 O.R. 475, followed. *Rex v. Miller* (No. 2), 288.

5. *Intoxicating Liquors—Liquor License Act—Selling Liquor without a License—Second Offence—Adjournments — Regularity of — Justice Appointed High Constable — Right to Act as Justice—Habeas Corpus—Appeal—Forum—Costs.*—The conviction of the defendant for a second offence under the Liquor License Act, R.S.O. 1897, ch. 245, was alleged to be illegal,

by reason of the invalidity of certain adjournments made during the progress of the case, namely: (1) adjournments made by the justice before whom the information was laid, prior to the trial before the police magistrate; and (2) adjournments made after the trial had been entered upon, by a justice who had been appointed high constable of the county, and who, moreover, had no connection with the case:—

Held, that the adjournments first referred to were valid under sec. 702 of the Criminal Code—made applicable by R.S.O. 1897, ch. 90—which empowers the justice who took the information to do “all other acts and matters necessary preliminary to the hearing,” for the hearing must be deemed to refer to the actual hearing or trial of the case; but as to the adjournments secondly referred to it was doubtful whether the justice could legally act as such, and, even if he could, he had no jurisdiction to intervene in the case and grant adjournments. In any event, however, the alleged defects were merely irregularities, which were waived by the defendant appearing before the police magistrate at the trial, stating his readiness to proceed, and submitting evidence on his own behalf.

An appeal from an order in Chambers refusing to discharge the defendant on *habeas corpus*, was dismissed; and costs of it were allowed to the Crown against the defendant, *BRITTON, J.*, dissenting.

Quære, whether an appeal lay to a Divisional Court; or whether the appeal might be referred to the Court of Appeal, the Attorney-General having refused a certificate under sec. 121 of R.S.O. 1897,

ch. 245; or whether, in any event, the Divisional Court was bound, at the defendant's request, to direct the issue of a new writ of *habeas corpus*. *Rex v. Miller*, 125.

6. *Selling Obscene Books and Pictures—Place of Offence—Evidence—Confession—Summary Trial—Police Magistrate—Reducing Charge to Writing—Prejudice—Examination of Documents before Trial—Conviction—Habeas Corpus—Certiorari in Aid—Amended Conviction—Scienter—Defective Warrant of Commitment—Direction to Amend—Detention of Prisoner—Substitution of Valid Warrant—Criminal Code, secs. 207 (a), 778 (3), 1120, 1124.*—The defendant was summarily tried and convicted by one of the police magistrates for the city of Toronto upon a charge laid under sec. 207 (a) of the Criminal Code. The information was that he "at the city of Toronto . . . did sell a quantity of obscene books, printed matter, pictures and photographs tending to corrupt morals." Being in prison pursuant to the conviction, an application was made for his discharge on the return of writs of *habeas corpus* and *certiorari* in aid.

The evidence before the magistrate was given by police detectives, who said that they found the articles produced upon the person of the defendant and in a valise in his room, that the defendant admitted that the valise was his, and said he had sold all these things for \$200—"he did not say he had sold them here," *i.e.*, in the city of Toronto, "but said he was here and expected to get the money here." No evidence was offered for the defence:—

Held, that there was evidence that the sale took place in Canada.

(2) It was urged that before evidence of a confession can be admitted, the prosecution must prove affirmatively that the confession was free and voluntary:—

Held, assuming the rule to be as stated and to be applicable upon such a motion, that there was nothing to shew that all the facts necessary to make the evidence admissible were not properly proved; the written record need not contain the allegations of a witness which will render his evidence admissible.

(3) A confession alone is sufficient to justify a conviction.

(4) Upon the evidence, sec. 778 (3) of the Criminal Code, requiring the charge to be reduced to writing and read over to the accused, after his consent to be summarily tried, was complied with; there is no reason why the charge should not be prepared in advance in anticipation of the accused's election; and the fact that the charge is in the form of an information is immaterial.

(5) It was objected that, before the actual trial of the case, the magistrate had looked at the books and pictures found in the defendant's possession, and had thereby necessarily become prejudiced against the defendant:—

Held, that, as the magistrate was at liberty to look at the productions before issuing a summons or warrant, in order to form his opinion as to whether or not a case was made out, he was entitled to do so after the defendant was in custody, or at any time.

(6) The information under which the defendant was convicted omitted to state that he "knowingly" did the act charged, which under the statute is a material element in the offence, and the same omission was made in

the conviction and in the warrant of commitment:—

Held, that, though the magistrate had amended the conviction, before return to the *certiorari*, by inserting the word “knowingly,” and though the defect in the information was immaterial, the omission of the word “knowingly” in the warrant was a fatal objection to its validity, which was not cured as being an “irregularity, informality, or insufficiency,” within the meaning of sec. 1124 of the Code.

(7) Although, however, the original warrant was clearly bad, the Court or Judge had power under sec. 1120 of the Code to “make an order for the further detention of the person accused,” and to direct the issue of a new warrant in accordance with the conviction as amended by the magistrate.

Rex v. Morgan (1901), 5 Can. Crim. Cas. 63, 272, 2 O.L.R. 413, 3 O.L.R. 356, followed.

(8) A conviction made by a magistrate, though under the summary trial provisions of the Criminal Code, is not in the same position as a conviction made by the Sessions, and may be amended by the magistrate before return to a *certiorari*. *Rex v. Graf*, 238.

See CLUB — MUNICIPAL CORPORATIONS, 3—TRESPASS.

CROWN ATTORNEY.

See MALICIOUS PROSECUTION—MUNICIPAL CORPORATIONS, 2.

CROWN CASE RESERVED.

See CRIMINAL LAW.

DAMAGES.

Personal Injuries — Permanent Disability — Pecuniary Loss —

Quantum — Judge's Charge — Address of Counsel to Jury — Mentioning Sum Claimed.]—The plaintiff, though not originally trained as a mining engineer, had by long experience become an expert examiner of gold mining locations; was 37 years of age, physically strong and healthy, and of excellent character. He was in receipt of a salary of \$6,000 a year from employers interested in gold properties, who spoke very highly of his capabilities and prospects. He was permanently disabled by injury sustained on one of the defendants' cars through their negligence. A jury awarded him \$30,000:—

Held, on appeal, that the amount was not so excessive as to entitle the defendants to a new trial.

Held, also, that by a reference in the charge to the jury to \$25,000 as a sum which would not appear large to a man earning \$6,000 a year, and by a mention of the sum claimed as \$50,000, the jury were not, reading the charge as a whole, left under the impression that they were directed as to the amount they were to fix.

Held, also, that counsel for the plaintiff, in opening to the jury, mentioning the sum claimed in the statement of claim, was not so objectionable as to be a ground for granting a new trial.

Judgment of ANGLIN, J., affirmed. *Bradenburg v. Ottawa Electric R.W. Co.*, 34.

See BROKER—CARRIERS—COVENANT—FATAL ACCIDENTS ACT—LICENSE—MASTER AND SERVANT, 3—PATENT FOR INVENTION—SALE OF GOODS.

DEED.

See EASEMENT.

DEFAMATION.

Libel—Newspaper—Security for Costs—Right of Sub-editor to Security—Application first Made to Master in Chambers—Finality of Decision—"Judge of the High Court"—Leave to Appeal from Order of Judge in Chambers—Con. Rule 1278—Affidavit in Support of Motion for Security—Sufficiency—R.S.O. 1897, ch. 68, secs. 10, 15.]— In an action for libels contained in a newspaper the defendant moved for security for costs under R.S.O. 1897, ch. 68, sec. 10, alleging in his affidavit that he was the "sporting editor" of the newspaper, and that he had the sole control and editorship of the sporting and dramatic intelligence:—

Held, that, as the editor of a department of a newspaper, he was entitled to security for costs.

Semble, that all who are engaged in any capacity in the work of publishing the newspaper in which an alleged libel appears are entitled to the protection given by the statute.

Egan v. Miller (1887), 7 C.L.T. Occ. N. 443, and *Neil v. Norman* (1901), 21 C.L.T. Occ. N. 293, distinguished.

The plaintiff having moved under Con. Rule 1278 for leave to appeal from the above decision:—

Held, that leave could not be given under either branch of the Rule, as there were no "conflicting decisions by Judges of the High Court upon the matter involved in the proposed appeal," and there appeared to be no "good reason to doubt the correctness" of the order sought to be appealed from.

The defendant's affidavit as to merits said, "I am advised by my solicitor and I believe that I have a good defence on the merits," the statute requiring "an affidavit

by the defendant or his agent . . . that the defendant has a good defence upon the merits:"—

Held, that the affidavit was sufficient.

Crossby v. Innes (1837), 5 Dowl. P.C. 566, followed.

Robinson v. Morris (1908), 15 O.L.R. 649, distinguished.

The statute requires that the defendant's affidavit should shew "that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous." The defendant swore that the words used by him were "innocent and harmless:"—

Held, that this was equivalent to swearing that the grounds of action were trivial and frivolous.

The Master in Chambers is not to be considered "a Judge of the High Court," under sec. 15 of the Act, and the order made by him was, therefore, not a final one under that section, but was subject to appeal to a Judge of the High Court.

Quære, whether the order of MEREDITH, C.J., being "an order made under section 10 by a Judge of the High Court," was non-appealable under sec. 15. *Robinson v. Mills*, 162.

DISCOVERY.

See PARTICULARS.

DISTRESS.

See LANDLORD AND TENANT.

DIVISIONAL COURT.

See APPEAL, 1, 2—CLUB—CRIMINAL LAW, 4.

DOMICILE.

See **BILLS AND NOTES, 1.**

EASEMENT.

Conveyance of Lots according to Registered Plan—Park Reserve and Entrance Marked on Plan—Obstruction by Purchaser of Lots—Right of Purchaser of other Lots to Removal—Mistake — Reformation of Deeds—Equitable Title—Registry Laws—Notice—Statute of Limitations—Period Necessary to Bar Right to Easement—Judgment in Former Action—Estoppel.—Upon a registered plan of land in the township of Bertie there were laid down one hundred and sixty-two lots, and there were shewn upon it six blocks, lettered from A to F; between these blocks there was a space marked "No thoroughfare, private entrance for occupants of lots in Crescent Beach tract;" and, except between blocks E and F, there was at the lake shore end of the space a figure marked "Park Private Reserve," and between blocks E and F two figures similarly marked. All of these lots were originally owned by the Crescent Beach Association, and the plaintiff and defendant each bought and had conveyed to them certain lots according to the registered plan, and certain other lots were demised to the defendant by the association for a term of 99 years from the 21st August, 1894. The defendant, by mistake, occupied with her house and grounds part of one of the spaces marked "entrance" on the plan and part of one of the parts marked "Park Private Reserve." The plaintiff, alleging the right of herself and all other the property holders at Crescent Beach to the enjoyment of the private entrance and park reserve, brought this action to re-

strain the defendant from obstructing and to compel the removal of the house, etc. The defendant pleaded a mistake as to the land conveyed and demised to her and also the Statute of Limitations:—

Held, that the defendant was not, in the present action, to which the association was not a party, entitled to a reformation of the instruments of conveyance from the association to her; and *semble*, that the evidence would not justify a reformation.

Held, also, that if the defendant were in equity the owner of the land which she claimed to have purchased from the association, her equitable right could not prevail against the plaintiff, who claimed under a registered conveyance; there was no evidence that the plaintiff purchased with such notice of the defendant's equitable right as would be required to defeat the plaintiff's registered title; all that was shewn was that the plaintiff had notice that the defendant was in possession and had made valuable improvements on the land, and that was not sufficient.

Held, also, following *Mykel v. Doyle* (1880), 45 U.C.R. 65, that the defendant's possession for ten years was not sufficient to bar the right of the plaintiff to the easements claimed by her.

Held, also, that the plaintiff was entitled to the easements or rights claimed; that was the effect of the plan and the conveyances of lots to her.

Semble, also, that the defendant was precluded by the judgment in a former action from setting up in this action the same defences in regard to the easements claimed by the plaintiff as had been set up

in regard to the lots in question in the former action.

Judgment of MULLOCK, C.J.Ex. D., reversed. *Ihde v. Starr*, 471.

ELECTION.

See ASSIGNMENTS AND PREFERENCES, 2.

EQUITABLE RELIEF.

See INFANT.

ESTOPPEL.

See BILLS AND NOTES, 2—EASEMENT — INFANT — INSURANCE, 3.

EVIDENCE.

See APPEAL, 2—CLUB—CRIMINAL LAW, 1, 2, 3, 6—FATAL ACCIDENTS ACT—MALICIOUS PROSECUTION—MASTER AND SERVANT, 2—NEGLIGENCE, 1.

EXECUTORS AND ADMINISTRATORS.

See BILLS AND NOTES, 1—MASTER AND SERVANT, 1—WILL, 3.

EXPRESS COMPANY.

See RAILWAY, 3.

EXTRA-PROVINCIAL CORPORATION.

See ASSIGNMENTS AND PREFERENCES, 1.

FALSE IMPRISONMENT.

See TRESPASS.

FATAL ACCIDENTS ACT.

Death of Young Child Caused by Negligence—Pecuniary Loss of

Parent—Reasonable Expectation of Benefit — Damages — Jury—Evidence—Judge's Charge.]—A verdict of a jury for \$300 damages for the death of the plaintiff's child, aged four years, in an action under the Fatal Accidents Act, was upheld by a Divisional Court and by the Court of Appeal (MOSS, C.J.O., and MACLAREN, J.A., dissenting), where it appeared that the child was healthy, intelligent, and with as good a prospect of prolonged life as any infant of that age could be said to have. The question is for the jury, upon the evidence; pecuniary benefit or advantage need not have been actually derived by the parent previous to the death; the probability of the continuance of life and the reasonable expectation that in that event pecuniary benefit or advantage would have been derived are proper subjects for consideration.

Pym v. Great Northern R.W. Co. (1862), 2 B. & S. 759, and *Blackley v. Toronto R.W. Co.* (1897), 27 A.R. 44n., applied and followed.

The trial Judge's direction to the jury upon the questions of damages and the findings of the jury upon the question of negligence were also considered and upheld by the Divisional Court. *McKeown v. Toronto R.W. Co.*, 361.

FIRE.

See APPEAL, 2.

FIRE INSURANCE.

See INSURANCE, 1—LIEN.

FOREIGN ADMINISTRATOR.

See BILLS AND NOTES, 1.

FORFEITURE.

See INSURANCE, 3.

FRANCHISE.

See STREET RAILWAY, 1.

FRAUD.

See INFANT.

GIFT.

See WILL.

GUARANTY.

See CONTRACT, 2—SALE OF GOODS.

HABEAS CORPUS.

See CRIMINAL LAW, 4, 5, 6.

HAWKERS.

See MUNICIPAL CORPORATIONS, 3.

HIGH CONSTABLE.

See CRIMINAL LAW, 5.

HIGHWAY.

Bridge—Duty of Municipality to Keep in Repair—Municipal Act, sec. 606—Collapse under Threshing Machine—Use of Traction Engines on Highways—R.S.O. 1897, ch. 242, sec. 10, and Amendments—"Ordinary Traffic"—Statutes—Imperative or Directory—Use of Planks to Strengthen Bridge—Condition Precedent—Liability for Injury to Bridge.]—The duty imposed upon a municipality, by sec. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), of keeping its highways, inclusive of bridges and culverts, in repair, is, so far as relates to

traction engines, subject to the requirements of sec. 10 of R.S.O. 1897, ch. 242, and the amendments thereto made by sec. 43 of 3 Edw. VII. ch. 7 (O.), and sec. 60 of 4 Edw. VII. ch. 10 (O.), whereby such engines, if of eight tons or over in weight, and not exceeding twenty tons, can only be run over a bridge or culvert subject to the condition that the owner must, at his own expense, first strengthen the bridge or culvert, and while so using them keep them in repair; but as to a threshing machine, if of less than eight tons in weight, the above obligation is not imposed; but the owner or person in charge is subjected to the obligation, which is imperative, and constitutes a condition precedent, that before crossing any such bridge or culvert he must lay down thereon planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine, etc., and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting therefrom to the flooring or surface of the bridge or culvert.

Where, therefore, the owner of a threshing machine under eight tons in weight, was in the act of drawing it across such a bridge, without having first put down planks, and though the bridge as constructed was not of sufficient strength to sustain the weight of the engine, but would have been had the boards been used, thereby diffusing the weight of the engine, and it fell through the bridge, damaging it, it was *held*, in an action brought by the owner of

the machine against the municipality, that no liability was imposed on the municipality, but that the owner was liable to the municipality upon a counterclaim for the damage so sustained; Moss, C.J.O., and MEREDITH, J.A., dissenting.

Pattison v. Township of Wainfleet (1902), 1 O.W.R. 407, discussed.

Judgments of ANGLIN, J., and a Divisional Court reversed. *Goodison Thresher Co. v. Township of McNab*, 188.

See NEGLIGENCE, 1.

HYDRO-ELECTRIC POWER COMMISSION ACTS.

See PLEADING.

INDIANS.

See PARTIES.

INFANT.

Contract—Fraudulent Representation as to Age—Benefit Obtained dehors the Contract — Equitable Relief — Estoppel.] — Unless for necessities, the contract of an infant is not binding on him, nor is he liable for a fraudulent representation that he is of full age whereby the plaintiff is induced to contract with him; and he is entitled to plead infancy in order to escape from a contract procured by his fraud when an infant.

The defendant, being the father of an illegitimate child, entered into a contract with the child's mother, the plaintiff, to pay for its maintenance. The plaintiff's solicitor, before the defendant executed the agreement, inquired of the defendant whether he was of full age, informing him that

if he was not, an affidavit of affiliation, already sworn to by the plaintiff, would be filed in order to preserve her rights under the statute. The defendant falsely assured the solicitor that he was of full age, and executed the agreement; and, in consequence of the representation, the solicitor did not file the affidavit; and, the time for filing it having expired, the plaintiff sued upon the contract:—

Held, that the defendant obtained nothing under the contract; the benefit accruing to him from the non-filing of the affidavit was not obtained as a term of the contract; but because of his fraudulent conduct *dehors* the contract; and the plaintiff was not, therefore, entitled to equitable relief; nor was the defendant estopped by his fraud from pleading infancy. *Jewell v. Broad*, 1.

INJUNCTION.

See COVENANT—PATENT FOR INVENTION.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES.

INSURANCE.

1. *Fire Insurance—Application—Untrue Answer—Warranty—Variation of Statutory Condition—Materiality to Risk—Invalidity of Variation—Statutory Condition No. 1—Non-Disclosure of Vendors' Liens—Completed Contract for Insurance—Withdrawal of President and Manager's Authority to Issue Policies.*]—The first statutory condition makes fire insurance of no force in respect to property in

regard to which the insurer has misrepresented any circumstance material to the risk. By variation or added condition, the insurers declared, in their policy sued on in this action, that any mortgage or other lien should be deemed material to the risk within the above condition:—

Held, that it still remained for a Judge or jury to determine the fact of the materiality or immateriality; and that if the added condition was intended otherwise, it could not be upheld as reasonable or just.

The insurance in question was on the "ordinary contents" of a barn and stable:—

Held, that the fact that there were vendors' liens on implements, part of such contents, which were not communicated to the insurers, was not material to the risk; and the fact that the plaintiff's application for insurance contained a warranty of the truth of his answers therein, and expressly stated that any untrue answer should avoid the policy, and the plaintiff falsely stated therein that nobody had any legal or equitable claim to the property insured, made no difference, the insurers not having made the warranty any part of the policy or of the contract of insurance, save as above mentioned.

At the annual meeting of the insurance company, the authority to issue policies was taken from the president and manager and vested in an executive committee:—

Held, that this applied only to policies to be issued on future applications or then unaccepted applications, and not to cases where, as here, there was a complete contract to insure. *Fritzley*

v. Germania Farmers' Mutual Fire Insurance Co., 49.

2. *Life Insurance — Benefit Society—Total Disability of Member through Insanity—Suspension for Non-payment of Dues — Total Disability Benefit—Failure to Comply with Rules of Society.*—M. was a regular beneficiary member of the defendant society, in good standing at the end of October, 1906, when he became, by reason of insanity, totally incapacitated from doing any work or following any employment. In November, 1906, he went to an insane asylum, where he remained, his incapacity continuing, until his death on the 3rd April, 1909. His dues to the society were paid up to the end of February, 1908, but, as they were not paid after that date, he was suspended for non-payment of dues. He would have been entitled, under the constitution and laws of the Society, to a total disability benefit of \$1,000, had he or some one on his behalf applied for it when he was in good standing, but his wife did not become aware of this till shortly before the 13th January, 1909, when she applied for it, but was refused. She then brought this action for it, her husband being joined as a plaintiff suing by a next friend; he died before the action came to trial:—

Held, upon reference to the constitution and laws of the society, that the member to obtain the benefit must be in good standing at the time he applies for it; and, express provision being made for an application by some one on behalf of the member where he is mentally incapacitated, the insanity in this case did not excuse the default; and the plaintiff was not entitled to recover.

Judgment of CLUTE, J., reversed. *McCuaig v. Independent Order of Foresters*, 613.

3. *Life Insurance—Premium not Paid in Full at Death—Acceptance of Part after Expiry of Days of Grace—Waiver of Forfeiture—Conduct and Practice of Insurers—Estoppel.*—In an action upon a policy of life insurance the defence was that the assured or the plaintiff (his wife) did not pay the quarterly premium due on the 1st September, 1908, on that date, nor within one month thereafter, the period of grace allowed by the policy, whereupon the policy lapsed, and was not revived, and was at the date of the death of the assured, the 3rd November, 1908, null and void.

The evidence shewed that the defendants, by their practice, through their agents, with the knowledge and consent of the superior officers, took money on account of premiums whenever it was given to them, whether the period of grace had expired or not; and in this case, of the \$2.55 premium due on the 1st September, \$1 was paid on the 23rd September, \$1 on the 1st October, and forty-five cents on the 24th October, these amounts being received by the defendants and carried into their books as good payments. The ten cents remaining due was, before the death, tendered to the agent to whom the plaintiff or the insured had been in the habit of paying, but was refused:—

Held, that, even if there was no tender of the ten cents before death, the defendants were not in a position to forfeit the policy; by their dealing they were estopped from saying that the policy was not a current policy on the 24th October; and the defendants

could not, on their own motion and without specific warning, afterwards revive the right to forfeit for non-payment of a small balance; and their implied engagement to accept that balance within a reasonable time remained operative though death ensued.

Judgment of the County Court of Wentworth reversed. *Whitehorn v. Canadian Guardian Life Insurance Co.*, 535.

See LIEN.

INTEREST.

See BROKER — MORTGAGE — SALE OF GOODS.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 5—MUNICIPAL CORPORATIONS, 1, 4, 5.

INVENTION.

See PATENT FOR INVENTION.

JUDGE'S CHARGE.

See CRIMINAL LAW, 3 — DAMAGES — FATAL ACCIDENTS ACT.

JUDGMENT.

Summary Judgment—Con. Rule 616 — Setting aside Judgment — Leave to Amend Defence and File Counterclaim — Terms — Appeal — Practice — Discretion.—In an action for a money demand, after pleadings had been delivered and the defendant examined for discovery, the plaintiff moved for and obtained under Con. Rule 616 a judgment for the amount of his claim, based on the pleadings and

the defendant's depositions. The defendant appealed to a Divisional Court, and at the same time moved for leave to amend his defence and to counterclaim against the plaintiff. The Divisional Court made an order directing that, upon payment into Court of the amount of the judgment, it should be set aside and the defendant allowed to amend his defence and to file a counterclaim; the defendant to pay the costs of the motion and appeal. The defendant then appealed to the Court of Appeal:—

Held, that the terms imposed upon the defendant were too onerous; they should not extend beyond what might be reasonably necessary for the protection of the plaintiff pending the final disposition of the action; otherwise they might amount to a denial of justice to the defendant.

The order was varied (MEREDITH, J.A., and RIDDELL, J., dissenting) by directing that the judgment should stand for the protection, *quantum valeat*, of the plaintiff, and that the defendant should be at liberty, upon payment of the costs of the original motion and of the appeal to the Divisional Court, to amend his defence and file a counterclaim.

Per MEREDITH, J.A., and RIDDELL, J., that the terms were in the discretion of the Divisional Court, and the only variation should be that the defendant should have leave to give security for the debt, instead of paying it into Court.

Per MEREDITH, J.A., that in matters of mere practice, and especially in matters of discretion, no encouragement should be given to appeals to the Court of Appeal. *Auerbach v. Hamilton*, 570.

See COSTS—EASEMENT.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL, 3,4—STREET RAILWAY, 2.

JURY.

See DAMAGES — FATAL ACCIDENTS ACT—MALICIOUS PROSECUTION—MASTER AND SERVANT, 1—NEGLIGENCE, 1.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 5.

LANDLORD AND TENANT.

Distress and Sale where no Rent Due—R.S.O. 1897, ch. 342, sec. 18 (2)—*Recovery of Double the Value of Goods Sold and full Costs*—*Interpretation of Statutes*—“*May*”—*Relief against Penalties*—*Judicature Act*, sec. 57 (3)—*Discretion*—*Landlord's Bailiff*—*Liability*—*Costs of Counterclaim*—*Set-off*.]—Where distress and sale are made for rent when no rent is due to the person distraining, the owner of the goods is entitled, under R.S.O. 1897, ch. 342, sec. 18, sub-sec. 2, to recover double the value of the goods distrained or sold, and full costs of suit.

Notwithstanding that the word “*may*” alone is used in the subsection, whereas “*shall and may*” is in the original enactment, 2 W. & M., sess. 1, ch. 5, sec. 4, there is no difference in the effect; there is no discretion in the trial tribunal to give less than double the value or less than full costs; nor is there power, by virtue of the provision in the *Judicature Act*, sec. 57 (3), enabling the High Court “to relieve against all penalties and forfeitures,” to reduce the double value to the single value or otherwise.

The costs are fixed by the statute itself; and the discretionary power given by the Rules of Court relating to the imposition of or dispensation from costs is not exercisable in regard to costs given by statute.

The right to recover the double value not only exists against the landlord but extends to his officers and bailiffs engaged in the illegal proceedings.

The plaintiff was entitled to judgment for double the value of the goods with costs, and the defendants to judgment on a counterclaim with costs; the amounts recovered by the parties respectively for debt and costs to be set off and payment made according to the result.

Judgment of TEETZEL, J., varied. *Webb v. Box*, 540.

See ASSIGNMENTS AND PREFERENCES, 1.

LIBEL.

See DEFAMATION.

LICENSE.

Privilege of Posting Bills on Walls — Contract — Construction — Seal — Sale of Premises — Revocation of License — Contract by Grantee with another Bill Poster — Damages.]—An agreement was entered into between the owner of a house and the plaintiffs, an advertising company, whereby the owner, therein called the lessor, agreed to sell, and the plaintiffs, called the lessees, agreed to take, for a term of five years, all the advertising privileges on a wall of the house, at the yearly rental of \$5, with the right of cancellation to

the lessees on one month's notice, should the location become valueless for advertising purposes, either from buildings or other causes. The document was not sealed, but the word "seal" was printed opposite the owner's signature. The plaintiffs painted an advertisement on one of the walls. In 1908 the owner sold the house, giving the purchaser a conveyance thereof and stating that the plaintiffs' right was merely from year to year, and that the rent was paid up to January, 1909, when the plaintiffs' rights ceased. The purchaser, after January, 1909, made a contract with the defendants, another advertising firm, for the right to paint on the wall, and they, thereupon, painted out the plaintiffs' advertisement, painting thereon one of their own, which the plaintiffs painted out, repainting their own, and brought an action against the defendants for damages, etc.:—

Held, that the action was not maintainable; that the agreement made with the plaintiffs amounted merely to a revocable license, which was revoked by the sale and conveyance to the purchaser.

Kerrison v. Smith, [1897] 2 Q.B. 445, followed.

Wood v. Leadbitter (1845), 13 M. & W. 838, *Lowe v. Adams*, [1901] 2 Ch. 598, and *London County Council v. Dundas*, [1904] P. 1, referred to and discussed.

Quære, whether an acknowledgment by the purchaser of the plaintiffs' rights would enable an action to be brought against her. *Connor-Ruddy Co. v. Robinson-Whyte Co.*, 133.

See ASSIGNMENTS AND PREFERENCES, 1 — CLUB — MUNICIPAL CORPORATIONS, 3.

LIEN.

Advances by Bank to Lumbermen—Insurance of Lumber against Fire—Loss Payable to Bank—Destruction of Lumber by Fire—Lien of Sawyer—Possessory Lien Terminated by Fire.]—The defendant bank advanced to C. & Co., lumbermen, money wherewith to carry on lumbering operations. With the bank's knowledge, the plaintiff contracted with C. & Co. to saw their logs into lumber, which he did. C. & Co. then insured this lumber, making the loss payable to the bank; and, while lying in the plaintiff's yard, the lumber was burnt. The plaintiff claimed to be entitled to payment, out of the insurance moneys, in priority to the bank, of the contract price of the sawing:—

Held, that the plaintiff had, at most, a mere possessory lien upon the lumber, for the price of the sawing, depending not upon contract, but wholly upon possession, and therefore brought to an end by the fire; while the bank had a lien upon the insurance moneys, which the plaintiff was not in a position to attack or displace.

Judgment of RIDDELL, J., reversed. *Chew v. Traders Bank of Canada*, 74.

LIFE INSURANCE.

See INSURANCE, 2, 3.

LIMITATION OF ACTIONS.

See CONTRACT, 3—EASEMENT.

LIQUIDATED DAMAGES.

See COVENANT.

LIQUOR LICENSE ACT.

See CRIMINAL LAW, 5—MUNICIPAL CORPORATIONS, 1, 4, 5.

LOCAL OPTION BY-LAW.

See MUNICIPAL CORPORATIONS, 4, 5.

LUNATIC.

See INSURANCE, 2.

MAINTENANCE.

See WILL, 2, 3.

MALICIOUS PROSECUTION.

Non-responsibility of Defendants — Evidence — Nonsuit — Malicious Issue and Execution of Search Warrant—Advice and Direction of Solicitor and Crown Attorney—Facts Laid before Advisers—Conflict of Evidence—Question for Jury.]—The defendants, wholesale merchants, laid an information against O., a salesman in their employment, charging him with the theft of goods which he had sold to the plaintiffs at low prices. O. being brought before a police magistrate, the defendants gave evidence, and O. was committed for trial. The magistrate directed the Crown Attorney to summon S. R. W., one of the plaintiffs, on a charge of unlawfully receiving stolen goods. A formal information was then sworn to by a detective on the direction of the Crown Attorney, and a summons served on S. R. W. the information was afterwards amended so as to include the other plaintiff; and both plaintiffs were committed for trial on the charge of unlawfully receiving stolen goods. The Crown authorities, instead of

laying before the grand jury indictments for theft and receiving, indicted the plaintiffs and O. jointly for conspiracy to defraud the defendants; the grand jury at the Sessions returned a true bill; at the trial all the accused were found not guilty. Otherwise than by an acquittal on the indictment for conspiracy, the original charges of theft and receiving were not disposed of.

On the information for theft being laid, the defendant A. laid an information before a justice charging that a quantity of his goods had been stolen, and that he suspected that the same were concealed in the premises of the plaintiffs, upon which a search warrant was issued and placed in the hands of a detective, who, with the defendant A., went to the plaintiffs' premises and seized and took away all the goods which the defendants alleged had been stolen by O. The defendants' solicitor accompanied A. to the justice when the warrant was obtained, and the Crown Attorney approved of the warrant being issued upon the statements made by A. and the solicitor.

In actions for malicious prosecution and for maliciously and wrongfully causing a search warrant to be issued and the premises and property of the plaintiffs to be searched and the plaintiffs' goods to be seized and taken away:—

Held, as to the claims for malicious prosecution, that the defendants were not responsible for the first prosecution because it was the result of a direction by the magistrate, given without any request or suggestion by the defendants, and were also not responsible for the conversion of the original charge into a charge of

conspiracy. Otherwise than by giving their evidence as Crown witnesses, the defendants in no way aided or encouraged the prosecution of the plaintiffs, and their depositions before the magistrate merely disclosed that O., without authority, sold the goods to the plaintiffs at greatly reduced prices; there was nothing in the defendants' evidence inconsistent with the innocence of the plaintiffs, and therefore nothing properly to influence the magistrate in directing the plaintiffs to be charged with a crime.

Fitzjohn v. Mackinder (1861), 9 C.B.N.S. 505, distinguished.

Judgment of FALCONBRIDGE, C.J.K.B., on this branch of the case, affirmed.

Held, as to the claims based on the issue and execution of the search warrant, that, as the evidence of the plaintiffs and defendants was in conflict upon a number of points, and, if the evidence of the plaintiffs and O. was accepted, there were several important facts which the defendants did not submit to their solicitor or to the Crown Attorney, it should have been left to the jury to find whether the defendants did lay all the facts of their case fairly before counsel, and whether they acted *bonâ fide* upon the advice given, and also whether the goods were in fact sold at less than their value.

Judgment of FALCONBRIDGE, C.J.K.B., on this branch of the case, reversed.

An action lies for wrongfully issuing and executing a search warrant.

Semble, that issuing a search warrant is not a mere ministerial but a judicial act of the justice, and the warrant in this case was illegally obtained and might have

been quashed by reason of the fact that the information did not disclose facts and circumstances shewing the causes of suspicion.

Rex v. Kehr (1906), 11 O.L.R. 517, specially referred to. *Willinsky v. Anderson*, 437.

MANSLAUGHTER.

See CRIMINAL LAW, 3.

MARRIAGE.

See CONTRACT, 3—WILL, 3.

MASTER AND SERVANT.

1. *Injury to and Death of Servant*—*Workmen's Compensation for Injuries Act*—*Notice Prescribed by sec. 9*—*Reasonable Excuse for Failure to Give*—*Administrator*—*Right to Give Notice before Issue of Letters*—*Ignorance of Law*—*Negligence*—*Workman Run over by Train in Railway Yard*—*Findings of Jury*—*Licensee*—*Statutory Duty*—*Defective System*—*New Trial*—*Ground not Alleged in Pleading*.]—Section 9 of the Workmen's Compensation for Injuries Act, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in the case of death the want of notice shall not bar the action which the Act gives, if the Judge is of opinion that there was "reasonable excuse" for the want of notice:—

Held, that ignorance of the law is not a "reasonable excuse;" and in this case the plaintiff, the brother of the deceased person who was injured, might have given the notice before he was appointed

administrator, and his solicitor's mistaken idea to the contrary did not excuse the want of the notice; and the action therefore failed.

Judgment of a Divisional Court reversed.

The deceased was employed by the defendants as a workman on the tracks in a railway yard, and, when crossing the tracks with other workmen on his way home from work, was struck by an engine and killed. The negligence alleged was that the engineer in charge of another engine in the yard let off a large quantity of steam, which prevented the deceased from seeing or hearing the engine which struck him. The jury found that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks; that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; and that there was no contributory negligence. On these findings the trial Judge entered judgment for the plaintiff:—

Held, by the Divisional Court, that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Dominion Railway Act, because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, within the mean-

ing of clause 1 of sec. 3, from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend.

The Court of Appeal, reversing the judgment upon the other ground, did not, as a Court, express an opinion upon these points.

But, *semble*, *per* OSLER, J.A., referring to *Willetts v. Watt & Co.*, [1892] 2 Q.B. 92, that the discretion of the Court below in allowing the plaintiff to make a new case, after the time had elapsed within which a new action could be brought, should not, on that ground, be interfered with.

Semble, *per* GARROW, J.A., that the true position of the deceased at the time of the accident was not that of a mere licensee, but of a person upon the defendants' premises by their invitation, and one to whom the defendants owed a duty to take reasonable care that he should not be injured.

And, *semble*, *per* MEREDITH, J. A., that there was no proof of any negligence on the part of the defendants; and the granting of a new trial in order to enable the plaintiff to set up an entirely new case was contrary to proper practice. *Giovinnazzo v. Canadian Pacific R.W. Co.*, 325.

2. *Injury to Servant—Negligence—Railway—Fall of Lump of Coal from Locomotive Tender—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Res Ipsa Loquitur—Release—Evidence—Invalidity.*—The plaintiff was in the employment of the defendants, and, while at work upon a railway track, was struck by a lump of coal which fell from the tender of a passing locomotive, and injured.

It appeared from the evidence, in an action for damages for the injury sustained, that the coal was unnecessarily piled in the tender above the sides in such quantity and manner that the rapid motion of the train shook down the lump, which, falling upon the corner, flew off with dangerous force and struck the plaintiff:—

Held, that the unexplained fall of the coal, in the circumstances stated, was in itself evidence from which an inference might well be drawn that those in charge or control of the locomotive (Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, sub-sec. 5) were negligent in their mode of using it by piling or permitting coal to be piled upon the tender so high and without protection that chunks of it could be hurled by the necessary motion of the train with such force as to break a man's leg 15 or 20 feet away; and a verdict for the plaintiff for \$1,500 under the Workmen's Compensation for Injuries Act, was upheld.

Doctrine of *res ipsa loquitur* explained and applied.

The defendants set up as a bar to the action a release signed by the plaintiff, after action, in consideration of \$300 paid to him by the defendants. The plaintiff was without independent advice, and stated that he believed from what was said that what he was releasing, and all he intended to release, was a claim to wages during his compulsory idleness, all parties, including the doctor, being under the impression that at the end of the period for which he was being paid he would be well and back at work:—

Held, that, as the plaintiff's statement was believed by the trial Judge, a finding against the

validity of the release should not be disturbed.

Judgment of CLUTE, J., affirmed. *O'Brien v. Michigan Central R.R. Co.*, 345.

3. *Summary Order of Magistrate under Master and Servant Act—Payment of Wages and Damages—Jurisdiction—Prohibition—Abortive Appeal.*—A magistrate in dealing with a complaint under sec. 11 of the Master and Servant Act, R.S.O. 1897, ch. 157, has no jurisdiction to order payment of wages for any period after the discharge of the servant.

Goode v. Downing (1904), 5 Terr. L.R. 505, approved and followed.

Where a conviction under the Act expressly awarded damages as for wrongful dismissal, and the want of jurisdiction was thus apparent on the face of the proceedings, prohibition was granted.

Semble, that if the magistrate had severed the amount awarded for wages and damages, the prohibition might have been limited to the award of damages.

An abortive attempt to enter an appeal from the conviction did not disentitle the applicant to move for prohibition. *Re Swanick and Kotinsky*, 407.

4. *Traveller—Payment by Commission—"Good and Accepted Orders"—Interpretation of Contract—"Continuously"—Incapacitation by Use of Drugs—Wrongful Dismissal—Temporary Illness—Self-caused Illness—Borrowing Money from Customers—Allowing Employer's Goods to be Seized for Rent—Justification of Dismissal.*—By agreement in writing between the plaintiff and the defendants, the plaintiff was, as traveller for the defendants, "continuously" for a period of three years to take orders

for goods to be supplied by the defendants from samples furnished by them, and to take care of all samples and return the same from time to time as requested; and the defendants were to pay him eight per cent. "on all good and accepted orders:"—

Held, that "good and accepted orders" was not synonymous with "orders accepted and filled;" nor did the words refer only to orders which the customer could by law compel the defendants to fill; but, if the defendants dealt with an order in such a way as to lead the plaintiff and the customer to believe that they intended to fill it, it was "accepted" within the meaning of the contract.

Held, also, that where the defendants received an order for goods and sent it to their factory, that the goods might be made to fill the order, that was an acceptance of the order within the meaning of the contract.

The plaintiff, who was a man of nervous temperament, contracted a cold, and about July, 1907, commenced to use a certain catarrh cure which contained cocaine, and this drug, by his increasing use of the cure, reduced him to such a nervous wreck that in October, 1908, he was taken to a sanitarium. He recovered by November 29th following, but in the meanwhile his landlord had seized the goods in the house rented by him, and amongst others the defendants' samples, and the defendants had to pay \$135 to recover them, and on October 31st, 1908, the defendants discharged the plaintiff, who brought this action to recover commission and damages for breach of the contract of employment:—

Held, that the plaintiff was entitled to damages, inasmuch as his

illness was not such as indicated that he would not be able to perform his contract for a substantial part of the unexpired period, and therefore not such as to put an end to the agreement in a business sense.

Held, also, that neither the use of the word "continuously" in the contract made any difference, nor the fact that the illness of the plaintiff was brought on, to a great extent, if not wholly, by his own folly, inasmuch as the illness of a nervous subject, allowing himself to be overcome by a seductive drug which saps his powers of self-control as well as his physical strength, cannot be fairly taken out of the category "act of God."

Held, also, that the fact that the plaintiff had borrowed certain sums of money from customers of the defendants, did not justify the dismissal, inasmuch as none of the witnesses said that the borrowing had in the least affected them, nor seemed to think the less of the plaintiff or of the defendants on account of it.

Held, also, that the fact that the plaintiff has permitted the defendants' property to be seized for rent, in spite of the provisions in the contract, about taking care of the samples and returning the same as required, did not justify the dismissal, because, though it amounted to a breach of the agreement, it was not wilful, and could be compensated for.

Held, therefore, that the plaintiff was entitled to damages in addition to his commissions; and a reference was directed on both branches of the case; the defendants to be at liberty to prove any set-off or counterclaim. *McDougall v. Van Allen Co. Limited*, 351.

MASTER AND SERVANT ACT.

See MASTER AND SERVANT, 3.

MECHANICS' LIENS.

1. *Material - man — Contract—Material Supplied outside of Contract—Time for Registration of Lien—R.S.O. 1897, ch. 153, sec. 22, sub-sec. 2.*—The words "the last material" in sec. 22, sub-sec. 2, of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, providing that "a claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed," mean the last material furnished by the material-man under his contract, where there is a distinct contract; and where he furnishes materials outside of his contract, the time for registering his claim for lien in respect of the material supplied under the contract begins to run from the time of the last delivery of material under the contract, without regard to the time of delivery of material outside of the contract.

Lindop v. Martin (1883), 3 C.L.T. 312, and *Morris v. Tharle* (1893), 24 O.R. 159, distinguished. *Rathbone v. Michael*, 428.

2. *Sub-contractor — Material-man—Registration of Lien—Time—Material not actually Used in Building or Placed on Land—R.S.O. 1897, ch. 153, secs. 4, 22.*—The plaintiffs contracted with E. to supply him with lumber to be used in the construction of a building which he was erecting for the defendant on lands in Port Arthur, at the price of \$454.82. The lumber was sent in different

shipments, the last of which arrived at Port Arthur on the 11th November, 1907, and was taken possession of by E.'s foreman, but was not in fact used in the defendant's building or placed upon his land. E. having made default in payment, the plaintiffs on the 10th December registered a claim for lien on the lands under the Mechanics' Lien Act for the price of the lumber:—

Held, reversing the judgment of BRITTON, J., at the trial, that the lien was registered too late, as it was not registered until more than thirty days had elapsed since any material furnished by the plaintiffs had been placed upon the land or used in the construction of the building.

Bunting v. Bell (1876), 23 Gr. 584, and *Hall v. Hogg* (1890), 20 O.R. 13, considered.

Semble, that the lien would have attached if the material had been placed upon the land, under the control of the owner, within the thirty days, even although not incorporated in the building. *Ludlam-Ainslie Lumber Co. v. Fallis*, 419.

MINES AND MINERALS.

1. *Staking and Recording Claim—Appeal—Status of Appellant—Mining Recorder—Appeal from Decision of—Dates Set out on the Record—Acceptance of—Order of Mining Commissioner Extending Time for Appeal—Constitutional Law—Legislation Authorizing Appointment of Mining Commissioner with Powers of Judge—Costs—Attorney-General.*]—M., a licensee who had staked out a mining claim, on the following day took up the stakes, obliterated the markings, and restaked; and sub-

sequently recorded on the last staking:—

Held, that his right to the claim was barred under sec. 136 of the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), as amended by sec. 36 of 7 Edw. VII. ch. 13 (O.), for not having recorded on the first staking; and therefore he had no status to call in question the claim of D., another licensee.

Re Cashman and Cobalt and James Mines Limited (1907), 10 O.W.R. 658, followed.

Semble, *per* RIDDELL, J., that on the evidence D. was properly entitled to the claim, even if M. had a status to attack it.

The notice of appeal from the decision of a Mining Recorder had the Mining Recorder's indorsement thereon of its having been filed on the 24th of the month. The notice stated—as also did an order made by the Mining Commissioner extending the time for appealing and for substitutional service—that the date of the recording of the decision was the 10th of the month.

On an appeal to a Divisional Court from the Mining Commissioner's order extending the time, etc.:—

Held, that the date so stated of the recording (and not a prior date contended for by the appellant), as also the date so stated of the filing of the appeal, being matters of record, should be accepted, so that the appeal was taken within the fifteen days allowed by sec. 75 of the Act.

Held, also, that under sub-sec. 2 of sec. 75 the Mining Commissioner could properly make the order extending the time, etc., and could do so on the appellant's *ex parte* application.

The appeals were therefore dismissed with costs, except—RID-

DELL, J., dissenting—that no costs were allowed to the Attorney-General; but, *per* FALCONBRIDGE, C.J.K.B., and BRITTON, J., without prejudice to any action or proceeding taken or to be taken by the appellant to test the jurisdiction of the Mining Commissioner, or the validity of the Act of the legislature authorizing the appointment of such an officer with the powers of a Judge; RIDDELL, J., not dealing with the matter, in view of the decision of the majority of the Court to leave the matter open, though intimating that, in his opinion, the legislation could not be successfully attacked.

Decisions of the Mining Commissioner affirmed. *Re Munro and Downey*, 249.

2. *Mining Claim — Dispute — Status of Licensee—Decision of Commissioner—Right of Appeal—Discovery — Affidavit — Mining Act of Ontario*, 1908, secs. 59 (3), 63, 151.]—Section 63 of the Mining Act of Ontario, 1908, places it beyond doubt that a dispute alleging that any recorded claim is illegal or invalid, in whole or in part, may be filed by any licensee without his being entitled or claiming to be entitled to any right or interest in the lands or mining rights. And where the Mining Commissioner deals with the dispute in the first instance and not by way of appeal from the Mining Recorder's decision, an appeal from the Commissioner's decision lies under sec. 151. And *semble*, *per* Moss, C.J.O., that the same right of appeal exists now, if not previously, even when the decision is upon an appeal from the Recorder.

Re Cashman and Cobalt and James Mines Limited (1907), 10

O.W.R. 658, and *Re Munro and Downey* (1909), 19 O.L.R. 249 (*ante* 1), distinguished.

Held, upon the evidence, that S. was a licensee, and entitled as such to dispute H.'s claim and to maintain an appeal against the adverse decision of the Commissioner; but that, in so far as S. claimed the right to dispute as a person entitled to be recorded as the owner or holder of a right or interest as upon a discovery followed by staking, etc., no case had been made to entitle him to such a position; and the Commissioner, in deciding the dispute based on S.'s position as a licensee, was justified in finding that H.'s claim was valid.

Semble, *per* Moss, C.J.O., that the mere adoption by a licensee of valuable minerals taken out by another licensee in the course of working upon a claim, at a time when he is still working it and claiming a right to do so, cannot be turned into a discovery sufficient to lay the ground-work of a claim for the benefit of the adopter—unless perhaps after an actual reverter to the Crown from some of the causes mentioned in sec. 34 of the Act. And in this case S. could not in good faith make the affidavit required by sec. 59 (3) of the Act.

Re McNeil and Plotke (1908), 13 O.W.R. 6, distinguished. *Re Smith and Hill*, 577.

MINING ACT OF ONTARIO, 1908.

See APPEAL, 1 — MINES AND MINERALS.

MINING COMMISSIONER.

See MINES AND MINERALS.

MISDIRECTION.

See CRIMINAL LAW, 3.

MISTAKE.

See EASEMENT.

MONEY IN COURT.

See BILLS AND NOTES, 1.

MORTGAGE.

Assignment — Re-assignment — Covenant for Payment — Right of Action — Ability to Give Release — Parties — Proviso for Re-payment — Rate of Interest post Diem — Costs. — In an action upon the covenant for payment in a mortgage made by the defendant to S., P. was originally the sole plaintiff, claiming as assignee of S., but, notice of the assignment being denied by the defence, an order was made in Chambers allowing S. to be added as co-plaintiff, and as thus constituted the action went to trial, where it appeared that the mortgage money had been advanced by two separate lenders, for whom S. was trustee, and that, by an earlier assignment than that under which P. at first claimed, the mortgage, the covenants therein, and the mortgage money, had been assigned to the *cestuis que trust*, to hold in proportion to their respective interests in the moneys secured, and that, by divers mesne assignments, etc., the mortgage and the covenants and the mortgaged property had, before action, been further assigned by the *cestuis que trust* to, and had become vested in, P. No notice of any of these assignments had been given to the defendant:—

Held, that the plaintiffs were

entitled to maintain the action, and were in a position to give an effectual release, upon payment of the amount due.

Under the proviso for repayment the principal money was to be repaid on the 20th February, 1903; the interest at seven per cent. in half-yearly payments on the 20th days of February and August in every year; “and in the event of the said principal and interest or any part thereof remaining unpaid after any of the days above limited for payment thereof, then in every such case (the mortgage to be void) upon payment also of interest at the rate aforesaid upon all interest and principal so remaining unpaid from the day or days above limited for payment thereof till payment shall be made:”—

Held, that the plaintiffs were entitled to interest at the mortgage rate upon principal remaining due after the 20th February, 1893, and also upon any interest which was then due.

Imperial Trusts Co. v. New York Security and Trust Co. (1905), 10 O.L.R. 289, approved.

St. John v. Rykert (1884), 10 S.C.R. 278, and like cases, distinguished.

Held, also, that there was no good reason why the defendant should not pay the costs of the action.

Judgment of MEREDITH, C.J.C.P., affirmed. *Pringle v. Hutson*, 652.

MORTGAGE TRUST DEED.

See CONTRACT, 1.

MOTOR VEHICLES ACT.

See NEGLIGENCE, 1.

MUNICIPAL CORPORATIONS.

1. *By-law of City Council Limiting Number of Tavern Licenses—Powers of Council—Liquor License Act, sec. 20 (1)—Construction and Effect—Annexation of Town to City—Repeal of Town By-law—Annexation of New Territory to City after First Reading of By-law—By-law not Re-introduced—Motion to Quash—Discretion.*—A by-law passed by the council of the city of Toronto, on the 15th February, 1909, providing that the number of tavern licenses to be issued in the city “for the ensuing license year beginning on the 1st day of May, 1909, and for each subsequent license year until this by-law is altered or repealed, shall be limited to one hundred and ten:”—

Held, within the powers conferred upon councils by sec. 20 (1) of the Liquor License Act, R.S.O. 1897, ch. 245, to “limit the number of tavern licenses . . . for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed.”

On the 9th February, 1908, the town of East Toronto passed a by-law limiting to five the number of licenses that might be issued in that town; on the 15th December, 1908, the town became annexed to and part of the municipality of the city of Toronto; and thereafter the city council passed the by-law in question. It was argued that there were two by-laws in force dealing with the same matter, but unequal in their effect:—

Held, that the city by-law applied to the whole territory embraced within the city limits, and in effect repealed any by-laws inconsistent with it.

It was also objected that after the first reading of the city by-law some other outlying territory became annexed to the city, and that the by-law should have been re-introduced before being finally passed:—

Held, that, the by-law being legal on its face and nothing fraudulent or improper being shewn, the Court should, in its discretion, decline to quash the by-law on this ground.

Re Secord and County of Lincoln (1865), 24 U.C.R. 142, followed.

Order of MEREDITH, C.J.C.P., refusing to quash the by-law, affirmed by a Divisional Court holding as above; and leave to appeal refused by the Court of Appeal.

Per OSLER, J.A., delivering the judgment of the Court of Appeal, refusing leave to appeal:—The plain object and intent of sec. 20 (1) of the Liquor License Act is to enable the council to do one of two things: (1) to pass a by-law limited in its operation to the then ensuing license year, which will come to an end, *ex vi termini*, at the end of that year, leaving the next succeeding license year to be provided for, if at all, by a new by-law to be passed before the 1st day of March next before its commencement; or (2) to pass a general by-law applicable to any future license year, commencing with the 1st day of May after its passage. The expression “any future license year” means “all” future license years.

The omission of the council to re-introduce the by-law and to read it a first and second time after the annexation of additional territory was merely a matter of the internal regulation of their business, which, in the absence of statutory obligation, they were at

liberty to alter or suspend at their discretion. *Re Brewer and City of Toronto, Re Robinson and City of Toronto*, 411.

2. *County of Essex — Office of Clerk of the Peace and Crown Attorney — Place for — Duty of County Council.*]—An action by the Clerk of the Peace and Crown Attorney of the county of Essex for a declaration that the proper place for his office is the city of Windsor in that county, notwithstanding that the town of Sandwich is the county town, and for a mandamus to compel the county council to provide a proper office for him in Windsor, was dismissed, the Court having no power to declare that an office shall be established or arrangements made for it in Windsor, simply because the tide of business life has flowed away from Sandwich, where the county buildings are, in which as in other counties this and other offices are provided for.

Judgment of FALCONBRIDGE, C.J.K.B., reversed. *Rodd v. County of Essex*, 659.

3. *Hawkers and Peddlers — County By-law for Licensing — Magistrate's Conviction — Municipal Act, 1903, sec. 583 (14)—6 Edw. VII. ch. 34, sec. 26 (O.)—Bonâ Fide Servant of Manufacturer—Onus—Finding of Magistrate—Uncontradicted Evidence — Review on Motion to Quash Conviction—Sale to Retail Traders—“Hawkers”—Evidence Disclosing only one Sale—Going from Place to Place—Validity of By-law — License Fees Specified for Certain Classes—Towns in County — Penalty, Division of—Reward.*]—The defendant was tried before a justice of the peace on an information charging a violation of a by-

law of a county by selling stoves without a peddler's license. The defendant produced what he alleged to be an agreement with a foundry company carrying on business in Ontario, and said that he was manager and agent for the company, and that the goods which he sold were the manufacture of the company. The magistrate came to the conclusion that the defendant was a purchaser from the company, and that the agreement was not *bonâ fide*; and the defendant was accordingly convicted. On a motion to quash the conviction:—

Held, that under sec. 583 (14) of the Consolidated Municipal Act, 1903, as amended by 6 Edw. VII. ch. 34, sec. 26 (O.), the onus was upon the defendant of satisfying the magistrate that he did not come within the general provisions of sec. 583 (14), but did come within the proviso that no license should be required for peddling to any retail dealer any goods the manufacture of this Province by the *bonâ fide* servants of the manufacturer having written authority in that behalf; and, although there was no evidence contradicting the testimony of the document and the evidence of the defendant, the magistrate was not bound to accept the evidence, for there is no rule in our law that a trial tribunal must accredit any witness, even when not contradicted.

2. The definition of “hawkers” given in sec. 583 (14) (a) is not, and is not intended to be, exhaustive.

3. Though the defendant made only one sale, he went from place to place with horses and conveyances drawing certain ranges for sale, and that was what the statute and by-law forbade.

4. A by-law may be attacked upon a motion to quash a conviction.

5. Although sec. 1 of the by-law contained an express prohibition against peddling, etc., by all persons without a license, and sec. 2 provided only for four classes of persons receiving licenses, yet any one desiring to peddle was entitled to a license, and, the fees for such license being fixed in the by-law for certain classes of persons only, the county could not refuse a license to other classes, or require a license fee to be paid therefor; the defendant came within the classes named, and did not complain that he was refused a license.

6. The by-law purported to relieve any town in the county not separate for municipal purposes from the county from the necessity of declaring in a by-law passed by the town that the county by-law was not to be in force:—

Held, that, if the county had no power to make such a provision, the provision was a mere nullity, and did not affect the validity otherwise of the by-law.

7. Section 7 of the by-law provided that one-half of every penalty levied under the provisions of the by-law should go to the informer and the other half to the county treasurer, etc. This was complained of as being contrary to sec. 708 of the Consolidated Municipal Act, 1903:—

Held, that, if the clause was not valid, there was no provision for the division of the penalty, and sec. 708 applied to the fullest extent; the defendant was not interested in the application of the fine.

8. By sec. 8 of the by-law the county treasurer was authorised, in a certain event, "to pay to the party receiving the conviction the sum of \$10:."—*Held*, that this might be *ultra vires* of the county council; but the defendant was not affected. *Rex v. Van Norman*, 447.

4. *Incorporation of Village—Continuance in Force of Existing By-laws—Consolidated Municipal Act, 1903, sec. 55—"In Force"—Prohibition of Local Option By-law not Operative.*—Section 55 of the Consolidated Municipal Act, 1903, provides that "in case a village is incorporated . . . the by-laws in force therein . . . shall continue in force until repealed or altered by the council of the new corporation:—"

Held, that the words "in force" in this section mean "having the force of law," or, "being in existence;" and that, therefore, a by-law prohibiting the sale of intoxicating liquor, passed by a township council before a village in the township was incorporated, continued in force, within the meaning of the above section, after the incorporation, although it provided that it was not to "come into operation and be in full force and effect" until a date subsequent thereto. *In re Denison and Wright*, 5.

5. *Local Option By-law—Repeal—Ineffective Proceedings—Submission of New By-law—Time-limit—6 Edw. VII. ch. 47, sec. 24, subsec. 6 (O.)*—A village council passed a local option by-law in 1906; a petition for its repeal was presented in 1908; and proceedings were taken for the submission of a repealing by-law to the electors in 1909. The electors voted

upon the by-law, but the number in favour of it was insufficient to authorise the council to pass it. The proceedings were in fact invalid because the voting took place more than five weeks after the first publication of the by-law:—

Held, that the ineffective proceedings taken in respect of this repealing by-law were not a bar to the submission of another repealing by-law before the year 1912, notwithstanding the provision of 6 Edw. VII. ch. 47, sec. 24 (sub-sec. 6 of sec. 141 of R.S.O. 1897, ch. 245), that “in case such repealing by-law is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third annual municipal election thereafter.” *Re Vandyke and Village of Grimsby*, 402.

See CLUB—HIGHWAY—PLEADING—STREET RAILWAY—TRESPASS.

MURDER.

See CRIMINAL LAW, 3.

NEGLIGENCE.

1. *Automobile Left Standing on Side of Road—Injury to Person Driving by Horse Shying—Motor Vehicles Act—Evidence—Onus—Unreasonable Use of Highway—Contributory Negligence—Findings of Jury.*—Under sec. 18 of the Motor Vehicles Act, 6 Edw. VII. ch. 46 (O.), where any loss or damage is incurred or sustained by a person by reason of a motor vehicle on a highway, the onus is imposed on the owner or driver of proving that the loss or damage did not arise through his negligence. The defendant, the owner of an automobile—a bright red

one—was driving to a village, intending to stop at an hotel there and have dinner. On arriving at the foot of a hill, the road over which led to the hotel, he found that, owing to the condition of the road, it was impracticable to drive the car up the hill, so he drew it up at the side of the road about two feet from the travelled part, locking it, as required by the Act, and taking the key with him, and then went to the hotel and had dinner, remaining there some three hours. While the car was in this position, the plaintiff was in the act of driving down the hill, and, when he was about twenty rods from the car, his horse caught sight of it and shewed signs of fright. The plaintiff, notwithstanding, drove him on about a rod, when he again shewed fright; the plaintiff still urged him on, and when within a rod and a half of the car he shewed an inclination to leave the road, and, on the plaintiff pulling him back, he wheeled round and upset the carriage, whereby the plaintiff and the horse and carriage were injured. It appeared that the car could have been driven to a yard of another hotel some 600 feet away:—

Held, that there was evidence of negligence to submit to the jury as to there being an unreasonable user of the highway, and an unauthorized obstruction thereof, and, therefore, a finding in favour of the plaintiff should not be disturbed; *MEREDITH*, C.J.C.P., dissenting.

Per MEREDITH, C. J. C. P.:—Apart from sec. 18, there was no evidence of negligence to submit to the jury; in view of the requirements of that section, it would be difficult to direct judgment to be entered for the defendant; but

there should be a new trial, and the jury should be directed to find whether the automobile, in the place where it was, was an object likely to frighten horses of ordinary gentleness, and also whether there was contributory negligence on the plaintiff's part.

Judgment of the County Court of Elgin affirmed. *McIntyre v. Coote*, 9.

2. *Breaking of Railing of Spectators' Gallery in Hockey Rink—Injury to Spectator—Liability of Owners—Insufficient Strength of Railing—Employment of Competent Architect.*]—The defendants, the owners of a rink, were held liable in damages for negligence in respect of injuries sustained by the plaintiff, who paid for a seat in the rink to see a hockey match, and who was injured by reason of the breaking of the railing of the gallery, above the ice, in which he was seated—the railing not being so constructed as to resist the outward pressure of the spectators leaning forward to see what was going on below, which was to be expected and should have been guarded against. The defendants were not absolved because they had employed a competent architect.

Francis v. Cockrell (1870), L.R. 5 Q.B. 501, and *Duncan v. Perthshire Cricket Club* (1904), 42 Sc. L.R. 327, followed.

Judgment of RIDDELL, J., affirmed. *Stewart v. Cobalt Curling and Skating Association*, 667.

See CARRIERS — FATAL ACCIDENTS ACT—MASTER AND SERVANT, 1, 2—PARTNERSHIP, 1.—RAILWAY, 1, 4.

NEW TRIAL.

See CRIMINAL LAW, 1—MASTER AND SERVANT, 1.

NEWSPAPER.

See DEFAMATION.

NONSUIT.

See MALICIOUS PROSECUTION.

NOTICE.

See CARRIERS — EASEMENT — PARTNERSHIP, 1.

NOTICE OF ACCIDENT.

See MASTER AND SERVANT, 1.

NOVATION.

See PARTNERSHIP, 2.

OBSCENE BOOKS.

See CRIMINAL LAW, 6.

PARENT AND CHILD.

See FATAL ACCIDENTS ACT.

PARTICULARS.

Statement of Claim—Postpone-ment till after Discovery—Practice.]—Where the defendant is entitled to particulars of an allegation in the statement of claim, but the plaintiff is unable to give the particulars until he has examined the defendant, within whose knowledge the particulars wholly lie, the proper order is that the plaintiff be at liberty to examine the defendant for discovery, and that particulars be delivered within a certain time after discovery has been obtained.

Order of the Master in Chambers varied. *Townsend v. Northern Crown Bank*, 489.

PARTIES.

Band of Indians—Representation of Class—Con. Rule 200—Order of Local Judge—Jurisdiction—Con. Rules 47, 368—Petition to Set aside Proceedings—Practice—Motives of Petitioners—Status.]
—In an action against a Band of Indians collectively and against five individual members of the Band, to recover moneys alleged to be due to the plaintiff for professional services rendered to the Band, an order was made by a local Judge, on the application of the plaintiff, and on the consent of a solicitor instructed by a resolution passed at a meeting of the Band, that the five individual defendants should defend on behalf of the Band for the benefit of all members of the Band, and that all members of the Band should be bound by any judgment that might be pronounced in the action, etc. Upon this order were founded a judgment for the plaintiff and an order appointing a receiver to receive all moneys due to the defendants from the Dominion Government, to be applied upon the judgment:—

Upon the petition of six members of the Band, on behalf of themselves and all other members, the Superintendent General of Indian Affairs and the Minister of Justice also joining as petitioners, to set aside the proceedings before the local Judge so far as they affected the rights of the Band or its members other than the individual defendants:—

Held, that the six petitioning members had the right, as representing the class to which they belonged, the members of the Band, to petition or move against the proceedings, and it was immaterial what their motives, or those of the other petitioners, in so

petitioning, were, nor was it important whether they came before the Court by way of petition, appeal, or otherwise.

An order for representation can only be made by the Court: Con. Rule 200; a local Judge is not the Court, and has no power to make such an order. Con. Rule 368 applies only to business properly brought before a Judge in Chambers; and Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county; here the solicitors for all those who were formally parties did reside in the county; but, before an order can be made by a local Judge binding those not formally before the Court, they must either agree that the motion be heard by him or have a solicitor residing within the county.

Order for representation and all orders and judgments based thereon set aside except so far as they affected the individual defendants. *Chisholm v. Herkimer*, 600.

See MORTGAGE—PLEADING.

PARTNERSHIP.

1. *Cheque Payable to Firm—Indorsement and Deposit by Partner in Bank to Credit of another Firm—Liability of Bank to Partner Deprived of Proceeds—Acquisition of Cheque—Conversion—Breach of Trust—Notice—Findings of Trial Judge—Absence of Negligence—Bona Fides.*—C., a member of a partnership of R. M. & C., received a cheque payable to the firm for a large sum due to the firm, and indorsed it in the name of the firm, which he had a right to do. Instead, however, of depositing the cheque to the credit of the firm or

cashing it and applying the proceeds for the benefit of the firm, he and M., without the knowledge or consent of R., took the cheque to a bank, where they opened an account in the name of a new firm, M. C. & M., of which they were members, and handed the cheque to the bank, indorsed also in the name of the new firm; the bank at once credited the new firm with the amount of the cheque. The assistant general manager of the bank, with whom the business was transacted, made no inquiries of any kind as to the old firm or the new firm. The trial Judge found no negligence and good faith on the part of the bank:—

Held, that the transaction was a discounting or purchase of the cheque by the bank; that the trial Judge's findings were supported by the evidence (OSLER, J.A., *dubitante*); and that without proof of negligence and bad faith the plaintiff, R., was not entitled to succeed against the bank in an action for conversion of the cheque or misapplication of it in breach of trust.

Capital and Counties Bank v. Gordon, [1903] A.C. 240, and *Ex p. Darlington District Joint Stock Banking Co.* (1865), 4 D. J. & S. 581, 11 Jur. N.S. 122, distinguished. *Ross v. Chandler*, 584.

2. *Dissolution—Retiring Partner—Liability for Debts of Firm—Discharge—Agreement to Accept New Firm as Debtors—Inference from Conduct—Novation—Findings of Fact.*—A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and

this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Where the liability of the retired partner is one resting not on estoppel only, but the firm of which he was a member is the actual debtor, it is necessary to make out a case of novation in order to discharge the retired partner.

Scarj v. Jardine (1882), 7 App. Cas. 345, distinguished.

The plaintiffs, creditors of a partnership, sought to recover the amount of their debt from a member of the partnership who had retired. Notice of this and of the fact that the business was continued by a new firm under the same name, and that the new firm had assumed and would pay the debts of the old firm, was given to the plaintiffs. The new firm having made an assignment for the benefit of creditors, the plaintiffs proved a claim against the estate in respect of the debt of the old firm, one of the plaintiffs acted as an inspector of the estate, and they received dividends from the assignee. The trial Judge found that the plaintiffs proved their claim forgetting that the dissolution had taken place and under the belief that they were proving it against the old firm, and that the acting as inspector and the receipt of the dividends were under the like belief:—

Held, that the findings of the trial Judge ought not to be disturbed, and that upon them a case of novation was not made out.

Judgment of RIDDELL, J., affirmed. *Cluff v. Norris*, 457.

3. *Syndicate—Right to Share Percentage of Profits—Non-Liability as Partners.*—A syndicate of men registered as a partnership to acquire, develop, and operate mines, and advertised that “special memberships” in the syndicate might be obtained for a certain price, and that such special members would become entitled to a 40 per cent. interest in the syndicate. The defendants applied for admission as special members on December 6th, 1906, paying the prescribed amount, and the applications were acknowledged and certificates sent them on February 14th, 1907, but not before. These certificates declared them entitled to share ratably with other special members in 40 per cent. of the net profits made by the syndicate:—

Held, that the defendants did not thereby become members of the partnership, and therefore were not liable for a debt contracted thereby.

Judgment of RIDDELL, J., affirmed. *McKim v. Bixel*, 81.

See ASSIGNMENTS AND PREFERENCES, 2.

PASSENGERS.

See RAILWAY, 4.

PATENT FOR INVENTION.

Infringement—Novelty—Utility—Burden of Proof—Earlier Patent—Disclosure of Invention—Failure to Manufacture—Failure to Mark Articles—Patent Act, secs. 38, 55, 69—Penalty—Injunction—Damages—Costs.—The plaintiff in 1896 obtained a patent for improvements in currycombs, the invention of B. An earlier patent had been granted to B., intended

to cover the same invention, but it was not kept on foot. The invention in effect consisted in a new arrangement of the face of a currycomb by so forming the edges of and correlating the teeth as to produce an effectual cleanser while doing away with some sources of irritation and possible injury to the animal's hide:—

Held, upon the evidence, that the patent was for a new and useful invention, that it had not been anticipated, and that B. was the true and first inventor.

Where a device is new and useful very little invention suffices to support the patent. The onus of shewing want of novelty and usefulness is on the party setting up these defences.

It was contended that the description in the specification of B.'s earlier patent disclosed the plaintiff's invention, and so made it public as to render ineffectual the issue to the plaintiff of his patent as a protection against user by the public of the invention therein described:—

Held, that a comparison of the specifications, drawings, and claims of the two patents shewed that the earlier ones did not cover the invention patented by the plaintiff.

Held, also, upon the evidence, that there had been a sufficient compliance with sec. 38 of the Patent Act by manufacturing the article.

Held, also, that the only consequence of a failure properly to mark the articles, as required by sec. 55 of the Act, is a penalty imposed by sec. 69; but, even under the United States law, the failure to mark does not affect the right to an injunction, but goes only to damages.

Judgment of ANGLIN, J., awarding the plaintiff an injunction restraining the defendants from infringing his patent, and a small sum for damages, with the costs of the action, affirmed.

Semble, if the discretion exercised as to costs were open to review, that it was properly exercised, as the defendants had contested the plaintiff's right throughout, and made sales after being notified of the infringement. *Overend v. Burrow Stewart and Milne Co.*, 642.

PAYMENT INTO COURT.

See APPEAL, 4.

PEDDLERS.

See MUNICIPAL CORPORATIONS, 3.

PENALTY.

See COVENANT—LANDLORD AND TENANT—MUNICIPAL CORPORATIONS, 3—PATENT FOR INVENTION.

PLAN.

See EASEMENT.

PLEADING.

Application to Strike out under Con. Rule 261—Reasonable Cause of Action—Nonjoinder of Necessary Party—Application to Stay Proceedings for—Con. Rule 206, Scope of—Discretion of Court under—Municipal Corporation—Hydro-Electric Power Commission Acts—Refusal of Fiat by Attorney-General—7 Edw. VII. ch. 19, sec. 23 (O.)—Right of Appeal from Chambers Order—Con. Rule 1278.]
—The plaintiff, a ratepayer of a city corporation, brought an ac-

tion against the corporation to have declared void a contract entered into between the corporation and the Hydro-Electric Power Commission of Ontario, for the supply of electrical power to the inhabitants of the city, and in his statement of claim alleged that the contract could be validly entered into by the corporation only with the assent of the electors, and that there was a material variation between the contract attacked and that set forth in the by-law which had been approved by the electors, inasmuch as the latter contained a limitation as to the price at which the power was to be supplied, which was not contained in the contract proposed to be entered into between the defendants and the Commission. The statutes by which the Commission was appointed provided that no action should be brought against it or any of its members without the consent of the Attorney-General, who refused to grant the plaintiff's application for a fiat permitting the joinder of the Commission as a defendant. The defendants having moved under Con. Rule 261 for an order that the statement of claim should be struck out, on the ground that it disclosed no reasonable cause of action, and for an order staying all proceedings until the Commission should be added as a defendant:—

Held, that, as the statement of claim appeared to disclose a substantial cause of action (see *Scott v. Patterson* (1908), 17 O.L.R. 270), it should not be struck out under the Rule in question, which applies only to pleadings which are obviously unsustainable, or to cases in which the Court is satisfied that a statement of claim discloses no cause of action at all.

Held, further, that, even assuming the existence of a contract binding upon the corporation and the Commission, the Court should not, in the exercise of the discretion vested in it under Con. Rule 206, stay the action until the Commission should be added as a co-defendant, inasmuch as the plaintiff had done all in his power to have it so added, having applied to the Attorney-General for a fiat permitting such joinder, which application had been strenuously opposed by the defendants, and refused.

Con. Rule 206 (1), which provides that "an action shall not be defeated by reason of the misjoinder of parties," applies also to nonjoinder, which is expressly included in the corresponding English Rule, and the authorities upon the latter are therefore applicable in our Courts.

Carter v. Clarkson (1893), 15 P.R. 379, at p. 380, approved.

Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co. (1880), 27 Gr. 592, and *Jones v. Imperial Bank of Canada* (1876), 23 Gr. 262, distinguished.

Discussion of the principles upon which the Court will act in the exercise of its discretion in ordering, or refusing to order, the joinder as defendant of a person who ought under ordinary circumstances to be so joined, and of the cases bearing upon the subject.

Semble, that, as the defendants' application should, under the practice, have been made before a Judge in Chambers, it was open to doubt whether they could have maintained their appeal to a Divisional Court without special leave under Con. Rule 1278. *Beardmore v. City of Toronto*, *Smith v. City of London*, 139.

See COSTS—MASTER AND SERVANT, 1—PARTICULARS.

POLICE MAGISTRATE.

See CLUB—CRIMINAL LAW, 6.

PRACTICE.

See APPEAL — COSTS — DEFAMATION — JUDGMENT — PARTICULARS—PARTIES—PLEADING.

PRISONS AND REFORMATORIES ACT.

See TRESPASS.

PRIVY COUNCIL.

See APPEAL, 3, 4 — STREET RAILWAY, 2.

PROHIBITION.

See MASTER AND SERVANT, 3.

PROMISSORY NOTE.

See ASSIGNMENTS AND PREFERENCES, 2—BILLS AND NOTES, 2.

PROVINCIAL LEGISLATURE.

See CRIMINAL LAW, 4.

PUBLIC POLICY.

See CONTRACT, 3.

QUANTUM MERUIT.

See CONTRACT, 3.

RAILWAY.

1. *Agreement for Use of Siding*
—Construction—Protection of Rail-

way from Animals — Negligence — Gate Left Open—Escape and Destruction of Animal—Implication of Terms in Contract.]—A siding was constructed by the defendants from the main line of their railway to the plaintiffs' mills, which stood in a two-acre enclosure bounded on one side by the defendants' fence. At the point where the siding entered the plaintiffs' land the defendants constructed and maintained a gate across the siding and connected with the fence on each side; this gate was usually kept shut by the defendants' servants except when taking cars to or from the mills, but it was not alleged that there was any agreement that the defendants should keep it shut. The gate was left open by the defendants' servants on one occasion after they had removed a car from the siding, and the plaintiffs' horse, which was loose in the two-acre yard, escaped through the gate and was run over by a train of the defendants on the permanent way. In an action to recover damages for the loss of the horse, the jury found that the injury was caused by the negligence of the defendants' servants in leaving the gate open. A clause in the agreement between the parties concerning the use and maintenance of the siding provided that the plaintiffs should "protect the railway of the company from cattle and other animals escaping thereupon from such portion of the siding as may be outside of the lands of the company:"—

Held, that this meant that the plaintiffs should keep animals from escaping from that part of their land occupied by the siding to the property of the company; the defendants owed no duty to

the plaintiffs to keep their animals away from the line of railway; the placing of the gate by the defendants, their custom of closing it, and the complaints of the plaintiffs that it was sometimes left open, could not create such a duty; and, therefore, there could be no negligence on the part of the defendants.

Per RIDDELL, J., that in the construction of the agreement it was of no significance that the clause above quoted was in the printed form of the defendants, a great part of the form having been struck out and much matter written in; also, that the practice of importing implied terms into a contract is a dangerous one; and there could be no implication here of a condition that the plaintiffs would be relieved from the agreement if the defendants left the gate open.

Judgment of the County Court of Middlesex affirmed; BRITTON, J., dissenting. *Woodburn Milling Co. v. Grand Trunk R.W. Co.*, 276.

2. *Carriage of Goods — Bill of Lading—Delivery of Goods without Surrender of — Condition — Claim for Loss — Time — Breach of Contract—Quantity — "More or Less."*]—A bill of lading of the defendants, covering wheat shipped, provided that its surrender should be required before delivery of the wheat, and that claims for loss or damage must be made in writing to the defendants' agent at point of delivery promptly after arrival of the wheat, and if delayed for more than thirty days after such delivery, or after due time for delivery, the defendants should not be liable in any event:—

Held, that the failure to make such claim in writing within the time specified did not relieve the

defendants from liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the wheat to the holder of the bill of lading and to no one else.

Where, therefore, the defendants had delivered the wheat without obtaining surrender of the bill of lading:—

Held, that the defendants were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, and the words “more or less” in the bill of lading did not, in the circumstances, affect the matter.

Mercer v. Canadian Pacific R.W. Co. (1908), 17 O.L.R. 585, distinguished. *Tolmie v. Michigan Central R.R. Co.*, 26.

3. *Carriage of Goods—Destruction—Liability—Contract or Tort—Special Contract between Express Company and Shipper—Construction—Application for Benefit of Railway Company.*]—The plaintiff delivered to the Dominion Express Company at Toronto goods for transmission to Quebec. The goods were being carried in a car upon the defendants’ railway, when a collision took place, and the goods were destroyed; the car was the defendants’, but the contents were wholly under the control and in the possession and under the physical oversight of a servant of the railway company:—

Held, that, although there was no privity of contract between the plaintiff and the defendants, the plaintiff had a good cause of action in tort.

Review of the authorities.

The shipping bill contained various provisions limiting the liability of the express company, *inter alia*, also, this provision: “And it is also understood that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom, through this company, the below described property may be intrusted or delivered for transportation:”—

Held, upon a construction of the whole shipping bill, that the defendants were not a company to whom, through the express company, the property was intrusted or delivered for transportation, and the goods were, therefore, not being carried by them under a special contract with the plaintiff; and they were liable as in tort for the value of the goods.

Lake Erie and Detroit River R.W. Co. v. Sales (1893), 26 S.C.R. 663, distinguished.

Quere, whether, if the defendants had been such a company, they could have taken advantage of a contract made by another company for their benefit, but without their privity. *Allen v. Canadian Pacific R.W. Co.*, 510.

4. *Carriage of Passengers—Injury to Passenger—Latent Defect in Wheel of Car—Derailment—Negligence—Liability.*]—The plaintiff brought this action for injury sustained by her owing to the breaking of a flange in the hind wheel of a car of the defendants, on which she was a passenger, on the occasion of an excursion, causing partial derailment and her violent ejection. The flange broke because of an inherent defect in the shape of an airhole at the time of the manufacture of the wheel. The defendants did not shew what

tests had been applied by the manufacturers of the wheel, or what could be done to detect the flaw; neither did they shew that they themselves made any proper examination of the wheel before using it:—

Held, that the defendants had failed adequately to discharge their duty of examining thoroughly and skilfully the equipment furnished for the excursion and were liable.

Judgment of CLUTE, J., affirmed. *Gaiser v. Niagara St. Catharines and Toronto R.W. Co.*, 31.

See APPEAL, 2 — MASTER AND SERVANT, 1, 2.

REFORMATION OF DEEDS.

See EASEMENT.

REGISTRY LAWS.

See EASEMENT — MECHANICS' LIENS.

RELEASE.

See MASTER AND SERVANT, 2 — MORTGAGE — PARTNERSHIP, 2.

REPEAL OF BY-LAW.

See MUNICIPAL CORPORATIONS, 5.

RES IPSA LOQUITUR.

See MASTER AND SERVANT, 2.

RES JUDICATA.

See CRIMINAL LAW, 4 — EASEMENT.

RESTRAINT OF TRADE.

See COVENANT.

REVOCATION OF LICENSE.

See LICENSE.

REWARD.

See MUNICIPAL CORPORATIONS, 3.

RINK.

See NEGLIGENCE, 2.

RULES.

Con. Rule 47.]—See PARTIES.

Con. Rule 200.]—See PARTIES.

Con. Rule 206.]—See PLEADING.

Con. Rule 261.]—See PLEADING.

Con. Rule 368.]—See PARTIES.

Con. Rule 616.]—See JUDGMENT.

Con. Rules 831, 833.]—See APPEAL, 4.

Con. Rule 1278.]—See PLEADING.

SALE OF GOODS.

Contract — Warranty — "Good Condition" of Fruit Trees — Counterclaim — Damages — Remedy Given by Contract — Jurisdiction of County Court — Promise of Guarantee by Agent — Waiver — Interest — Costs.]—A contract for the sale of fruit trees contained a warranty that the stock should be delivered in "good condition;" but, should it prove untrue to label, and not "equally as good" as the variety ordered, it would be replaced free, or purchase price refunded, etc., which should be in full settlement of all claims; that no outside agreement or bargain by the agent should in any way affect the contract; and that all stock which failed to live was to be replaced at half price at next delivery, provided notice thereof was given by a named date:—

Held, that the words "good condition" were synonymous with "good quality," and the warranty was not therefore confined to the external and apparent condition of the stock, but extended to the health so as to warrant that the stock was such as would live and thrive; and that this was apart from the provision as to their not being up to label, etc., this merely referring to replacing stock not of the kind ordered; nor was the purchaser restricted to the remedy provided by the contract of having stock that failed to live replaced, etc.; for the purchaser's right to bring an action, and hence to counterclaim, did not arise out of the contract at all, but was an independent right given by the law.

Compania Naviera Vasconzanda v. Churchill, [1906] 1 K.B. 237, distinguished.

A special warranty alleged to have been given by the plaintiffs' agent was set up by the purchaser; but on the evidence—apart from the express provision as to outside agreements, etc., by the agent—this was held to have been waived by the purchaser.

On a counterclaim for damages in a County Court action the defendant is not limited to \$200, but may recover an amount equal to the plaintiff's claim.

Davis v. Flagstaff Silver Mining Co. of Utah (1878), 3 C.P.D. 228, and *Wallace v. People's Life Insurance Co.* (1899), 30 O.R. 438, followed.

Judgment of the County Court of York, allowing the seller the price of the stock sold, without interest, and the purchaser \$200 damages on his counterclaim, in both cases without costs, affirmed with costs. *Wellington v. Fraser*, 88.

SEAL.

See LICENSE.

SEARCH WARRANT.

See MALICIOUS PROSECUTION.

SECURITY FOR COSTS.

See DEFAMATION.

SECURITY ON APPEAL TO PRIVY COUNCIL.

See APPEAL, 3, 4.

SELLING OBSCENE BOOKS.

See CRIMINAL LAW, 6.

SET-OFF.

See COSTS — LANDLORD AND TENANT.

SHARES.

See BROKER.

SOLICITOR.

See MALICIOUS PROSECUTION.

SPECIFIC PERFORMANCE.

See CONTRACT, 1.

STATED CASE.

See CLUB—CRIMINAL LAW, 2, 3.

STATUTE OF FRAUDS.

See BILLS AND NOTES, 2.

STATUTE OF LIMITATIONS.

See CONTRACT, 3—EASEMENT.

STATUTES.

- 55 Vict. ch. 99 (O.).....
See STREET RAILWAY, 2.
- R.S.O. 1897, ch. 48, secs. 1, 2 (Appeals to Privy Council).....
See APPEAL, 3, 4.
- R.S.O. 1897, ch. 51, sec. 57 (3) (Judicature Act).....
See LANDLORD AND TENANT.
- R.S.O. 1897, ch. 51, sec. 67.
See CRIMINAL LAW, 4.
- R.S.O. 1897, ch. 51, sec. 67, sub-sec. 1 (e).....
See CLUB.
- R.S.O. 1897, ch. 68, secs. 10, 15 (Libel and Slander Act).....
See DEFAMATION.
- R.S.O. 1897, ch. 83, sec. 8 (Habeas Corpus Act).....
See CRIMINAL LAW, 4.
- R.S.O. 1897, ch. 90 (Summary Convictions Act).....
See CRIMINAL LAW, 5.
- R.S.O. 1897, ch. 90, secs. 2 (1), 8.....
See CLUB.
- R.S.O. 1897, ch. 147, sec. 7 (Assignments and Preferences Act).....
See ASSIGNMENTS AND PREFERENCES, 2.
- R.S.O. 1897, ch. 153, secs. 4, 22, sub-sec. 2 (Mechanics' and Wage-Earners' Lien Act).....
See MECHANICS' LIENS, 1, 2.
- R.S.O. 1897, ch. 157, sec. 11 (Master and Servant Act).....
See MASTER AND SERVANT, 3.
- R.S.O. 1897, ch. 160, secs. 3 (5), (9) (Workmen's Compensation for Injuries Act).....
See MASTER AND SERVANT, 1, 2.
- R.S.O. 1897, ch. 166 (Fatal Accidents Act).....
See FATAL ACCIDENTS ACT.
- R.S.O. 1897, ch. 170, sec. 34 (1) (Landlord and Tenant's Act).....
See ASSIGNMENTS AND PREFERENCES, 1.
- R.S.O. 1897, ch. 208, sec. 41 (1) (Street Railway Act).....
See STREET RAILWAY, 1.
- R.S.O. 1897, ch. 242, sec. 10 (Traction Engines Act).....
See HIGHWAY.
- R.S.O. 1897, ch. 245, sec. 20 (1) (Liquor License Act).....
See MUNICIPAL CORPORATIONS, 1.
- R.S.O. 1897, ch. 245, sec. 121.....
See CRIMINAL LAW, 5.
- R.S.O. 1897, ch. 245, sec. 141 (6).....
See MUNICIPAL CORPORATIONS, 5.
- R.S.O. 1897, ch. 324, secs. 5, 6, 7 (Set-off).....
See COSTS.
- R.S.O. 1897, ch. 342, sec. 18 (2) (Distress).....
See LANDLORD AND TENANT.
- 62 Vict. (2) ch. 15, sec. 1 (O.).....
See CONTRACT, 1.
- 63 Vict. ch. 24, secs. 6, 14 (O.) (Extra-provincial Corporations).....
See ASSIGNMENTS AND PREFERENCES, 1.
- 1 Edw. VII. ch. 13, sec. 2 (O.).....
See CLUB.
- 3 Edw. VII. ch. 7, sec. 43 (O.).....
See HIGHWAY.
- 3 Edw. VII. ch. 19, sec. 55 (O.) (Consolidated Municipal Act).....
See MUNICIPAL CORPORATIONS, 4.
- 3 Edw. VII. ch. 19, sec. 583 (4), (10) (O.).....
See CLUB.
- 3 Edw. VII. ch. 19, secs. 583 (14), 708 (O.).....
See MUNICIPAL CORPORATIONS, 3.
- 3 Edw. VII. ch. 19, sec. 606 (O.).....
See HIGHWAY.
- 4 Edw. VII. ch. 10, sec. 60 (O.).....
See HIGHWAY.
- 4 Edw. VII. ch. 11, sec. 2 (O.).....
See CLUB.
- R.S.C. 1906, ch. 37, sec. 276 (Railway Act).....
See MASTER AND SERVANT, 1.
- R.S.C. 1906, ch. 69, secs. 38, 55, 69 (Patent Act).....
See PATENT FOR INVENTION.
- R.S.C. 1906, ch. 119, secs. 22, 54, 56, 58, 70, 74, 165 (Bills of Exchange Act).....
See BANKS AND BANKING.
- R.S.C. 1906, ch. 119, sec. 131.....
See BILLS AND NOTES, 2.
- R.S.C. 1906, ch. 144, sec. 99 (Winding-up Act).....
See COMPANY.
- R.S.C. 1906, ch. 146, secs. 207 (a), 778 (3), 1120, 1124 (Criminal Code)..
See CRIMINAL LAW, 6.
- R.S.C. 1906, ch. 146, secs. 259, 1014..
See CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, sec. 303.....
See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 702.....
See CRIMINAL LAW, 5.

- R.S.C. 1906, ch. 146, sec. 761.....
See CLUB.
- R.S.C. 1906, ch. 146, sec. 1018 (b) (d)..
See CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 148, sec. 3 (Prisons
 and Reformatories Act).....
See TRESPASS.
- 6 Edw. VII. ch. 11, secs. 75 (2), 136
 (O.) (Mines Act, 1906).....
See MINES AND MINERALS, 1.
- 6 Edw. VII. ch. 34, sec. 26 (O.).....
See MUNICIPAL CORPORATIONS, 3.
- 6 Edw. VII. ch. 46, sec. 18 (O.) (Motor
 Vehicles Act).....
See NEGLIGENCE, 1.
- 6 Edw. VII. ch. 47, sec. 24 (O.).....
See MUNICIPAL CORPORATIONS, 5.
- 7 Edw. VII. ch. 13, sec. 36 (O.).....
See MINES AND MINERALS, 1.
- 7 Edw. VII. ch. 19, sec. 23 (O.).....
See PLEADING.
- 8 Edw. VII. ch. 21, sec. 151 (3) (O.)
 (Mining Act of Ontario).....
See APPEAL, 1.
- 8 Edw. VII. ch. 21, secs. 59 (3), 63, 151
 (O.).....
See MINES AND MINERALS, 2.
- 8 Edw. VII. ch. 48, sec. 14 (O.).....
See CLUB.
- 8 Edw. VII. ch. 112, sec. 1 (O.).....
See STREET RAILWAY, 2.
- 8 & 9 Edw. VII. ch. 9 (D.).....
See CRIMINAL LAW, 3.

STATUTES (INTERPRETA- TION).

*See CRIMINAL LAW, 3—HIGH-
 WAY—LANDLORD AND TENANT.*

STAY OF PROCEEDINGS.

See PLEADING.

STREET RAILWAY.

1. *Assumption of Ownership by Municipality—Award of Arbitrators—Principle of Valuation—Allowance for Value of Franchise—Allowance for Compulsory Taking—Street Railway Act, sec. 41.]—* Arbitrators were appointed under the Street Railway Act, R.S.O.

1897, ch. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of sec. 41 (1) of the Act, by a town corporation, part of the railway being laid within the town.

The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the working thereof," and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever," in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the contention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value:"—

Held, Moss, C.J.O., dissenting, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellants' railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value.

Stockton and Middlesbrough Water Board v. Kirkleatham Local Board, [1893] A.C. 444, distinguished.

Right of owner to allowance of 10 per cent. as for compulsory taking discussed.

Judgment of BRITTON, J., reversed, and award remitted to the arbitrators for reconsideration. *Re Berlin and Waterloo Street R.W. Co. and Town of Berlin*, 57.

2. *Contract with Municipal Corporation — Construction — Decision of Judicial Committee*—55 Vict. ch. 99 (O.)—8 Edw. VII. ch. 112 (O.)—Upon appeal from a decision or order of the Ontario Railway and Municipal Board upon the hearing of an application to it involving the same question as that dealt with by the Judicial Committee of the Privy Council in *City of Toronto v. Toronto R.W. Co.*, [1907] A.C. 315:—

Held, that, inasmuch as it could not be said that it manifestly appeared that the decision of the Judicial Committee was founded solely upon the effect of the provisions of the Act 55 Vict. ch. 99 (O.), and not, to some extent at least, upon the language of the agreement validated and confirmed by that Act, the only course open was to affirm the order of the Railway and Municipal Board, notwithstanding sec. 1 of the Act 8 Edw. VII. ch. 112 (O.) *Re Toronto R.W. Co. and City of Toronto*, 396.

SUMMARY CONVICTIONS ACT.

See CLUB.

SUMMARY JUDGMENT.

See JUDGMENT.

SUMMARY TRIAL.

See CRIMINAL LAW, 6.

SYNDICATE.

See PARTNERSHIP, 3.

TAVERN LICENSES.

See MUNICIPAL CORPORATIONS, 1.

TIME.

See APPEAL, 1 — MECHANICS' LIENS—MINES AND MINERALS, 1 — MUNICIPAL CORPORATIONS, 5 — RAILWAY, 2.

TORT.

See RAILWAY, 3.

TRACTION ENGINES.

See HIGHWAY.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, 3.

TRESPASS.

False Imprisonment — Warrant of Arrest—Delay in Issue—Convict out on Bail—Commencement of Term of Imprisonment — R.S.C. 1906, ch. 148, sec. 3—Application to Summary Conviction under Provincial Statute—Liability of Municipal Corporation for Acts of Constable.—On the 17th January, 1907, the plaintiff was convicted by the police magistrate for the town of North Toronto as for a second offence of having sold intoxicating liquor without a license contrary to the provisions of the Liquor License Act, and was adjudged to be imprisoned therefor for four months. He was allowed to go at large, upon his own recognizance to appear when called

upon, until the 28th March, when he was arrested by M., a constable of the town of North Toronto, under a warrant of commitment issued by the magistrate (without notice to the plaintiff) on the 27th March, and delivered to the keeper of the gaol, who was thereby directed to receive the plaintiff and keep him in custody for four months. On the 28th June, 1907, the plaintiff was discharged (*Rex v. Robinson*, 14 O.L.R. 519), on the ground that the term of his imprisonment had expired on the 17th May, 1907. This action was brought against M. and the town corporation for trespass and false imprisonment. A notice of action was served on the 18th September, 1907, the cause of action stated being the assault and false imprisonment of the plaintiff from the 17th May until his discharge:—

Held, that, if sec. 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, did not apply to a commitment on summary conviction for an offence against an Ontario Act, the term of imprisonment under the conviction would not commence until the plaintiff's arrest or his lodgment in gaol; but, if the enactment did apply, the plaintiff was in fact out on bail—whether regularly and properly or not—from the date of the sentence till the 28th March, and, by the very terms of the section, the intermediate period was not to be reckoned as part of the term of imprisonment. The imprisonment was, therefore, lawful, and the action failed.

Rex v. Robinson (1907), 14 O.L.R. 519, overruled.

The King v. Taylor (1906), 12 Can. Crim. Cas. 244, approved.

M. was not the servant or agent of the town corporation in execut-

ing the warrant, and there was no ground for making the corporation a party.

Judgments of *MAGEE, J.*, and a Divisional Court, affirmed. *Robinson v. Morris*, 633.

TRIAL.

See DAMAGES.

TROVER.

See BROKER.

TRUSTS AND TRUSTEES.

See COMPANY—CONTRACT, 1—PARTNERSHIP, 1—WILL, 2.

WAGES.

See MASTER AND SERVANT, 3.

WAIVER.

See INSURANCE, 3—SALE OF GOODS.

WARRANT OF ARREST.

See TRESPASS.

WARRANT OF COMMITMENT.

See CRIMINAL LAW, 6.

WARRANTY.

See SALE OF GOODS.

WAY.

See HIGHWAY.

WILL.

1. *Construction* — *Direction to Pay Debts, etc.* — *Enumeration of*

Properties—Absence of Specific Disposition — Residuary Gift.]—

The testator by his will first directed that all his just debts and funeral and testamentary expenses should be paid and satisfied by his executors. Then followed: "I give devise and bequeath all my real and personal estate of which I may die possessed in manner following that is to say;" and immediately thereafter an enumeration of six properties, followed by: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto" his son and daughter, naming them:—

Held, that there was not an intestacy as to the enumerated properties, but that all the property of the testator, real and personal, was included in the residuary gift.

In re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726, distinguished. *Re Conger*, 499.

2. *Construction—Gift of Aliquot Share of Residue to each Child of Testator—Share of one Child to be Applied by Trustee for Maintenance—Gift to Trustee of Unexpended Balance—Right of Trustee to Receive Share.]—*Residuary devise upon trust to sell and divide proceeds equally among the testator's eight children (naming them) including E., with direction to executor to pay the share bequeathed to E. to W., upon trust, to pay for proper clothing for E. while an inmate of an insane asylum, provided that, in case she died before her share was exhausted, "then I bequeath the remainder of her said share to W., to be applied by him towards the liquidation of the debt on the Roman Catholic church at C." E. died in testator's lifetime:—

Held, that, inasmuch as the children did not take as a class, but an aliquot part of the estate was bequeathed to each child, W. was entitled, notwithstanding the death of E., to receive the one-eighth share which she would have been entitled to, to be applied by him as above mentioned.

Stewart v. Jones (1859), 3 DeG. & J. 532, discussed and distinguished.

In re Pinhorne, [1894] 2 Ch. 276, and *In re Whitmore*, [1902] 2 Ch. 66, discussed and followed.

Judgment of CLUTE, J., reversed. *In re Shannon*, 39.

3. *Right to Maintenance — Second Marriage of Widow—Discretion of Executors.]—*A testator directed that \$40,000, part of his estate secured on mortgages, should, when his youngest son attained 21, be divided between his wife and his three children; and that his executors should manage his estate till his youngest son should attain 21, and out of the interest, and out of the proceeds of his real estate, maintain his wife and children. The testator died in 1904, and in 1908, when the eldest child was only 16, the widow married again, but continued to reside in the same house as before, it being her property:—

Held, that the widow did not, by reason of her second marriage, forfeit her right to maintenance down to the time when she would become entitled to a share of the principal secured by the mortgages.

Cook v. Noble (1886), 12 O.R. 81, distinguished.

Carr v. Living (1860), 28 Beav. 644, and *Bowden v. Laing* (1844), 14 Sim. 113, doubted.

The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children.

The executors should determine what sum would be required out of the income to be applied for the maintenance of the mother and children, having regard to the competence of the second husband, but not laying overmuch stress on that, the income being ample, and the children not to be stinted, because all formed one household. *In re Miller*, 381.

WINDING-UP.

See COMPANY.

WORDS.

"*Any Future License Year.*"—*See* MUNICIPAL CORPORATIONS, 1.

"*Continuously.*"—*See* MASTER AND SERVANT, 4.

"*Deemed to be Abandoned.*"—*See* APPEAL, 1.

"*Good and Accepted Orders.*"—*See* MASTER AND SERVANT, 4.

"*Good Condition.*"—*See* SALE OF GOODS.

"*Hawkers.*"—*See* MUNICIPAL CORPORATIONS, 3.

"*Hire or Gain.*"—*See* CLUB.

"*Holder in Due Course.*"—*See* BILLS AND NOTES, 2.

"*House of Public Entertainment or Resort.*"—*See* CLUB.

"*In Force.*"—*See* MUNICIPAL CORPORATIONS, 4.

"*Judge of the High Court.*"—*See* DEFAMATION.

"*Knowingly.*"—*See* CRIMINAL LAW, 6.

"*Liquidated Damages.*"—*See* COVENANT.

"*Last Material.*"—*See* MECHANICS' LIENS, 1.

"*Manslaughter.*"—*See* CRIMINAL LAW, 3.

"*May.*"—*See* LANDLORD AND TENANT.

"*More or Less.*"—*See* RAILWAY, 2.

"*Murder.*"—*See* CRIMINAL LAW, 3.

"*Operate.*"—*See* CRIMINAL LAW, 2.

"*Ordinary Traffic.*"—*See* HIGHWAY.

"*Proprietary Club.*"—*See* CLUB.

"*Shall and May.*"—*See* LANDLORD AND TENANT.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, 1, 2.

WRONGFUL DISMISSAL.

See MASTER AND SERVANT, 4.

